75-291

Supreme Court, U. S.
FILED
AUG 21 1975
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT
OF THE UNITED STATES
DOCKET NO. 75-291

HERBERT C. KLEIN,

Petitioner,

vs.

KENNETH ROBINSON, et al.,

Respondents.

PETITION FOR A WRIT OF
CERTIORARI TO REVIEW A
JUDGMENT OF THE SUPREME
COURT OF NEW JERSEY

HERBERT C. KLEIN
Member of the New Jersey
Assembly, District 34
Pro Se
663 Main Avenue
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(a) This petition for a writ of certiorari seeks to review a decision of the Supreme Court of New Jersey. Robinson v. Cahill, 67 N.J. 333, 339 A.2d 193 (1975).

(i) The judgment sought to be reviewed was entered May 23, 1975.

(ii) There was no rehearing and no order extending time to file petition for certiorari.

(iii) Jurisdiction is based upon 28 U.S.C.A. §1257(3).

(b) Questions Presented

(i) Where a State Legislature appropriates funds for local school aid and directs that such funds be disbursed to local school districts in accordance with a formula adopted by the Legislature, and where a court orders that such funds be expended in accordance with a different formula, does not such action by the Court constitute violation of the principle of separation of powers?

(ii) Does not such action by the Court constitute an encroachment upon the exclusive legislative power to appropriate funds?

(c) The case involves the following provision of the Constitution:

Article IV, Section IV

"The United States shall guarantee to every State in this Union a republican form of government. . ."

(d) Statement of the Case

Plaintiffs instituted this action to challenge the validity of the formula adopted by the New Jersey Legislature for providing State aid to local school districts. The State Supreme Court held that the Legislature formula was violative of the State Constitution and hence invalid. Robinson v. Cahill, 62 N.J.473 (1973). The Court ordered the Legislature to adopt a new formula. By the decision sought to be reviewed the Court has gone still further. It has directed that approximately $290,000,000 in State aid shall not be distributed to those school districts designated in the Legislative formula but rather that it shall be redistributed to other school districts in accordance with a totally different formula.

(e) Petitioner, a member of the General Assembly of New Jersey, intially appeared in this cause when he filed a brief with the Supreme Court of New Jersey on March 7, 1975. Such brief was filed pursuant to order of that Court permitting members of the Legislature to file briefs in the cause. Petitioner's

aforementioned brief contains the following proposition:

"Similarly, the power to prescribe the mode of providing an educational system is vested in the legislature and in no other branch."

(f) Copies of opinions are separately filed.

REASONS FOR GRANTING CERTIORARI

The Court below has ordered that approximately $290,000,000 appropriated by the Legislature of New Jersey as aid to education in local school districts should not be distributed in accordance with the statutory formula; instead, the Court ordered redistribution of these funds in accordance with a totally different formula. As a result, many school districts in the State will be deprived of State aid that had been appropriated by the Legislature while others will receive State funds in excess of Legislative appropriations.

Petitioner is a member of the Legislature and represents District 34

in the General Assembly of New Jersey. Five of the six municipalities in District 34 would be deprived of Legislatively appropriated State school aid as a result of the Court ordered redistribution. More than 70% of the residents of Petitioner's legislative district reside in the five adversely affected municipalities.

THE ORDER OF THE NEW JERSEY SUPREME COURT CONSTITUTES AN ENCROACHMENT UPON THE EXCLUSIVE POWER OF THE LEGISLATURE TO APPROPRIATE FUNDS.

"The United States shall guarantee to every State in this Union a republican form of government . . ." Constitution, Article IV; Sect. IV.

Inherent in that guaranty is that the basis powers reserved to the people through their representatives shall not be ursurped. Although the modern view recognizes that the branches of government may not be divided "into water tight compartments," the doctrine of separation of powers still remains fundamental to Anglo American Law and the republican form of government.

Where one branch transgresses on powers clearly reserved to another, the action cannot be countenanced. No clearer example of a power that is exclusively in the Legislative domain could be imagined, than the power to appropriate funds.

This concept was well articulated by the dissenting opinion in the Court below:

"More and more courts have come to recognize that where a practical necessity exists, a blending of powers will be countenanced, but only so long as checks and balances are present to guard against abuses." 339 A.2d at 217

"But what of the power that we are considering here? We assume it would not be disputed that the power of appropriating public funds is commonly understood to be a legislative function. If the Court undertakes to reallocate funds the ultimate disposition of which has been fixed by the Legislature pursuant to the exercise of its acknowledged power

of appropriation, how is this new-found power of the Court to be controlled? How can it be checked? We discern no way that this can be done. The power to appropriate is singularly and peculiarly the province of the Legislature. It is commonly thought of as an adjunct to the taxing power. If the courts are at liberty, for whatever reason, to reallocate appropriated funds in some particular case, why may not the courts do so in other cases as well? Who is to stay the judicial hand and what law is to guide its exercise? There are no discernible boundaries or limits beyond which the power might not be exerted provided only that the Court were made to feel that the exigency of the moment was sufficiently serious to justify the action. It seems to us that the exercise of such a power by the courts is indeed unchecked, and that it cannot be said to fall within any relaxation of the doctrine of the separation of powers that has thus far been countenanced. See

generally Gibbons, "The Inter-dependence of Legitimacy: An Introduction to the Meaning of Separation of Powers," 5 Seton Hall L.Rev. 435 (1974); Wright, "The Role of the Supreme Court In A Democratic Society - Judicial Activism or Restraint?," 54 Cornell L.Rev. 1 (1968)." 339 A.2d at 217-218

"We recognize that it is difficult to deal in terms of constitutional absolutes. Constitutional interpretation is a delicate, sensitive and flexible process. Yet we cannot at the present time foresee a state of affairs or set of circumstances which would justify this proposed encroachment upon the prerogative of another branch of government." Dissenting opinion of Mountain and Clifford, JJ. 339 A.2d at 219.

It would be pedestrian to elaborate at length the travails which brought this nation into existence. Suffice it to say that in no small part it was due to the fierce resentment of its inhabitants over taxation without

representation. The Declaration of Independence justified the dissolution of the political bonds between the colonies and Great Britain in part: "For imposing taxes upon us without our consent."

Despite the great passage of time, the fundamental truths recognized two hundred years ago are as vital today. Our founding fathers understood only too well that no power belongs so peculiarly in the hands of the people and their legislative representatives as the power to raise and to spend money. The decisions as to how much and in what manner government shall make its expenditures must in the last analysis be vested in the people, no

matter how wise or unwise those decisions may seem to the Executive or Judicial branches.

In San Antonio School District v. Rodriguez, 411 U.S. 1, 36 L.Ed.2d 16, 93 S.Ct. 1278 (1973), the United States Supreme Court in reversing a three-judge panel which had found infirmities in the financing of the Texas school system held at 411 U.S. 1 58, 59, 36 L.Ed.2d 16, 57, 58, that:

> "The consideration and initiative of fundamental reforms with respect to state taxation and education are matters reserved for the legislative process of the various states, and we do no violence to the values of federalism and separation of powers by staying our hand. We hardly need add that this court's action today is not to be viewed as placing its judicial imprimatur on the status quo. The need is

> apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax. And certainly, innovative thinking as to public education, its methods, and its funding is necessary to assure both a higher level of quality and greater uniformity of opportunity. These matters merit the continued attention of the scholars who already have contributed much by their challenges. But the ultimate solutions must come from the law makers and from the democratic pressures of those who elect them."

The decision of the Court below, we submit, violates that fundamental principle of our republican form of government. By directing the redistribution of school funds, the Court below has directed that the State expend and appropriate money in a manner totally at odds with the expressed intent of the Legislature.

The decision to our knowledge is unique in our jurisprudence. It represents the first occasion in which a State Court has gone so far as to order the expenditure of funds in a manner different from that directed by the Legislature.

The Courts in almost every state have considered similar constitutional provisions concerning the financing of education in public schools. In reviewing the case law in the other states, it appears that no court has attempted to impose the extraordinary judicial remedies which the Governor and the plaintiffs now seek. Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973); Serrano v. Priest, 5 Cal.3d 584,

487 P.2d 1241, 96 Cal.Reporter 601 (1971); Blase v. State of Illinois, Sbarboro V. State of Illinois, 5 Ill.2d 94 (1973); Miller v. Nunnelley, 468 S.W.2d 298 (Ct.App. Ky. 1971); Milliken v. Green, 212 N.W.2d 711 (Mich. 1973); State ex rel. Woodahl v. Straub, 520 P.2d 776 (Mont. 1974); Spano v. Board of Education of Lake Land Central School District, 328 N.Y.S.2d 229 (1972); Burruss v. Wilkerson, 310 F.Supp. 572 (W.D. Va. 1969); Sweetwater County Planning Committee v. Hinkle, 491 P.2d 1234 (Wyo. 1971). Although several state courts have declared school financing systems unconstitutional, the remedy became effected by legislative revision and not judicial creation.

We respectfully submit that the importance of this question to the integrity of the republican form of government merits consideration by this Court.

(i) Copies of opinion will be submitted separately.

(j) The judgment is enclosed in the opinion.

Respectfully submitted,

HERBERT C. KLEIN
Member of the New Jersey
Assembly (District 34)
Pro Se

State of New Jersey:
:SS
County of Passaic :

I, Rose Ann Ferment, being duly sworn says:

1. I am a secretary employed in the office of Herbert C. Klein, a member of the New Jersey Assembly, District 34, pro se, petitioner.

2. On August 21, 1975, I served 3 copies of the foregoing petition for certiorari upon all of the parties required to be served by mailing 3 copies in duly addressed envelopes, with first class postage prepaid, as follows: Brendan T. Byrne, pro se, State House, Trenton, New Jersey; Lewis B. Kaden, Esq. 58 State Street, Perth Amboy, New Jersey; William F. Hyland, Atty. Gen., State House, Trenton, New Jersey; Warren, Goldberg & Berman, Esqs., 219 E. Hanover Street, Trenton, New Jersey; Borrus, Goldin & Foley, Esqs., 90 Paterson Street, New Brunswick, New Jersey; Ruvoldt & Ruvoldt, Esqs., 164 Ocean Avenue, Jersey City, New Jersey; William J. Bender, Esq., 5 Wendover Road, Montclair, New Jersey; Frank Askin, Esq., 180 University Avenue, Newark, New Jersey; William J. Zaino, Esq., 948 B. Village Drive East, North Brunswick, New Jersey;

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Rose Ann Ferment

Rose Ann Ferment

Sworn and subscribed to before me this 21st day of August, 1975.

Helen Rizzo

Helen Rizzo
A Notary Public of New Jersey
My commission expires 5/5/78

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Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

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Attorney General of New Jersey,
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On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

Counter-Statement of Question Presented

Does it violate the guarantee of a republican form of government found in Article IV, § 4 of the United States Constitution for a state's highest court, based upon a finding that inequalities in expenditures among school districts deprive some students of the "thorough and efficient" education guaranteed by the State Constitution,

to enjoin the distribution of funds pursuant to sections of the State's education laws which aggravate the unconstitutional inequalities in expenditures and to direct that all legislative appropriations for education shall be distributed pursuant to sections of the state's education laws which further the constitutional goal of equality of educational opportunity?

Counter-Statement of the Case

This case was commenced by the filing of a complaint in the Superior Court of New Jersey, Law Division, in February 1970 which alleged *inter alia* that the present system of financing public education in New Jersey violates various provisions of the United States and New Jersey Constitutions, and sought to enjoin the continued operation of the allegedly unconstitutional statutory scheme.

The court heard testimony between November 1 and 9, 1971, and on January 24, 1972 it issued a lengthy opinion holding that the entire present system of funding public education in New Jersey is unconstitutional. *Robinson* v. *Cahill,* 118 N. J. Super. 223, 287 A. 2d 187 (Law Div. 1972). The court found that school districts with high real property tax bases spent more per pupil than districts with low tax bases (118 N. J. Super. at 235-246, 287 A. 2d at 193-199), that the existing system of state aid for education failed to equalize the capacity of school districts to provide a quality education (118 N. J. Super. at 258-265, 287 A. 2d at 205-209), that the amount of money spent on education does affect the quality of education (118 N. J. Super. at 248-257, 287 A. 2d at 200-205) and that children in school districts with a low real property tax base were receiving an education inferior to

that provided children in wealthier school districts (118 N. J. Super. at 245-252, 287 A. 2d at 198-202). The court therefore concluded that the existing system of financing public schools discriminates against pupils residing in school districts with low real property wealth (118 N. J. Super. at 280, 287 A. 2d at 217). The court held that this discrimination was violative of the Equal Protection Clause of the Fourteenth Amendment and the comparable equal protection guarantees of the New Jersey Constitution. It further held that the inequality of educational opportunity afforded children in districts with low real property tax bases violates the guarantee of the Education Clause of the New Jersey Constitution that the Legislature provide for the maintenance and support of a "thorough and efficient" system of free public schools for all children between the ages of five and eighteen. *N. J. Const.,* Art. VIII, § IV, para. 1.

On appeal, the Supreme Court of New Jersey affirmed the trial court findings that significant disparities exist in expenditures per pupil and that the quality of education depends in substantial measure upon dollar input per pupil. *Robinson* v. *Cahill,* 62 N. J. 473, 481, 303 A. 2d 273, 277 (1973). But it concluded, as had the Court in *Rodriquez* v. *San Antonio Independent School District,* 411 U. S. 1 (1973) that these disparities do not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and it also found no violation of the equal protection guarantees of the New Jersey Constitution. 62 N. J. at 482-501, 303 A. 2d at 277-287. On the other hand, the Supreme Court of New Jersey agreed with the trial court that the system of financing public education in New Jersey fails to satisfy the guarantee of a "thorough and efficient" education contained

in the Education Clause of the State Constitution. 62 N. J. at 521, 303 A. 2d at 298. In a supplemental opinion, the court concluded that the existing system should be permitted to continue in operation until July 1, 1975 so that the Legislature could be afforded an opportunity to enact legislation which would satisfy the state constitutional guarantee. *Robinson* v. *Cahill,* 63 N. J. 196, 306 A. 2d 65 (1973).

A petition for writ of certiorari on behalf of the Speaker of the General Assembly and President of the Senate was thereafter filed with the Court, which denied the petition. *Dickey* v. *Robinson,* 414 U. S. 976 (1973).

Although numerous proposals designed to correct the constitutional defect in the State's system for financing public education were placed before the State Legislature, it failed to enact any changes in the system. In the face of this legislative inaction, various parties, including Governor Brendan T. Byrne, filed motions with the Supreme Court of New Jersey for supplemental relief to correct these constitutional defects. Other parties, including the petitioner, filed briefs in opposition to the motion, but none contended that the granting of the requested supplemental relief, including the distribution of legislative appropriations for education in a manner more compatible with the state constitutional requirement, would offend any provision of the United States Constitution.

In an opinion dated May 23, 1975, the court concluded that the enforcement of its original mandate required that it enjoin, effective July 1, 1976, the distribution of state aid for public education in accordance with sections of the education laws providing a fixed amount of aid per pupil, regardless of the real property tax base of the district, and a guarantee of aid at a level not less than that received in a base year, and that it direct the distribution of all state aid in accordance with sections of the law which seek to equalize disparities in the capacity of local districts to fund an adequate program of education. *Robinson* v. *Cahill,* 67 N. J. 333, —— A. 2d —— (1975). In so holding, the court said:

> "The Court has now come face to face with a constitutional exigency involving, on a level of plain, stark and unmistakable reality, the constitutional obligation of the Court to act. Having previously identified a profound violation of constitutional right, based upon default in a legislative obligation imposed by the organic law in the plainest of terms, we have more than once stayed our hand, with appropriate respect for the province of other Branches of government. In final alternative, we must now proceed to enforce the constitutional right involved.
>
> • • •
>
> "If then, the right of children to a thorough and efficient system of education is a fundamental right guaranteed by the Constitution, as we have already determined, it follows that the court must afford an appropriate remedy to redress a violation of those rights. To find otherwise would be to say that our Constitution embodies rights in a vacuum, existing only on paper." 67 N. J. at 339-340, 347.

There have been no amendments to the statutes governing the financing of public education since the Supreme Court of New Jersey's decision and thus, in the absence of prompt legislative action, the court's injunctive order will become effective on July 1, 1976.

ARGUMENT

There is no basis for granting the petition, because it is firmly established that the administration of state government is not subject to review in the federal courts under the guarantee of a republican form of government of Article IV, § 4 of the Constitution, and in any event, the order of the Supreme Court of New Jersey directing that the appropriations for public education shall be distributed in accordance with statutory provisions which will best discharge the state constitutional guarantee of equality of educational opportunity is fully consistent with well established judicial remedial powers.

The sole basis for this petition for writ of certiorari is the guarantee of a republican form of government found in Article IV, § 4 of the United States Constitution. Since it is firmly established that a claimed violation of the guarantee of a republican form of government is non-justiciable and the order of the Supreme Court of New Jersey sought to be reviewed is in any event fully consistent with well recognized remedial powers of the state and federal judiciaries, the petition should be denied.

The thesis of the petition is that the Supreme Court of New Jersey intruded upon an exclusive legislative domain by enjoining the distribution of legislative appropriations pursuant to statutory provisions which are inconsistent with the state constitutional guarantee of equality of educational opportunity and by directing that those funds be distributed in accordance with other statutory provisions which more nearly comport with state constitutional requirements, and that the court thereby violated the constitutional guarantee of a republican form

of government. However, it has been firmly established since *Luther* v. *Borden,* 48 U.S. (7 How.) 1 (1849) that a state's governmental structure is not subject to challenge in the federal courts pursuant to this Clause. See also *Ohio ex rel. Bryant* v. *Akron Metropolitan Park Dist.,* 281 U.S. 74 (1930). As stated by Justice Cardozo, speaking for the Court in *Highland Farms Dairy* v. *Agnew,* 300 U.S. 608, 612 (1937), "[h]ow power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself. . . .", and even if there were a possible denial of the guarantee of a republican form of government, ". . . the enforcement of that guarantee, according to the settled doctrine, is for Congress, not the court." Therefore, it is clear that the grounds relied upon in support of the petition are non-justiciable.

Furthermore, even if there were a basis for reconsideration of this settled interpretation of Article IV, § 4, the remedial order entered by the Supreme Court of New Jersey in this matter would not raise a federal constitutional issue. The subject of this petition is simply a remedial order of a court to redress a violation of fundamental constitutional rights. The New Jersey Constitution guarantees to every school age child that "[t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public school. . . ." *N. J. Const.,* Art. VIII, § IV, para. 1. The Supreme Court of New Jersey affirmed lower court findings that the State was failing to provide the constitutionally guaranteed level of educational opportunity and that one of the causes of this failure was the distribution of a minimum level of state aid to every school district, including those with a very high local property tax base, while providing insufficient state aid to afford the constitutionally guaranteed level of education in districts with a small

tax base. When the Legislature was unsuccessful over a period of several years in correcting this constitutional deficiency, the Supreme Court of New Jersey was compelled, in its own words, to "'afford an appropriate remedy to redress a violation of those rights. To find otherwise would be to say that our Constitution embodies rights in a vacuum, existing only on paper.'" 67 N. J. 347, A. 2d at . This remedial action, far from being a denial of federal constitutional rights, was thus simply the exercise of what has been, at least since *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137 (1803), a well recognized judicial power to review the constitutionality of legislative enactments and to provide an appropriate remedy where unconstitutionality is found.

The Court has indicated that the vindication of children's rights under the Equal Protection Clause of the Fourteenth Amendment to receive an education free from the taints of racial discrimination may call for the exercise of extensive remedial powers by the courts. See generally, *Swann* v. *Charlotte-Becklenburg Bd. of Ed.,* 402 U. S. 1 (1971). For example, in *Griffin* v. *County Board of Prince Edward County,* 377 U. S. 218, 233 (1964), the Court indicated that, if necessary to prevent further racial discrimination, the District Court might go so far as to ". . . require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia." The satisfaction of the guarantee of equality of educational opportunity contained in the Education Clause of the New Jersey Constitution requires a similar breadth of judicial remedial powers and thus even if a claim of a denial of the guarantee of a republican form of government were justiciable, this case would raise no issue under that clause of the Constitution.

CONCLUSION

It is respectfully submitted for the foregoing reasons that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM F. HYLAND,
Attorney General of New Jersey,
Attorney for Respondents, Governor of the State of New Jersey, Treasurer of the State of New Jersey, Commissioner of Education of the State of New Jersey, New Jersey State Board of Education, and State of New Jersey,
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Trenton, New Jersey 08625.

STEPHEN SKILLMAN,
Assistant Attorney General,
Of Counsel and On the Brief.

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APPENDIX TO PETITION
FOR A WRIT OF CERTIORARI

HERBERT C. KLEIN
Member of the New Jersey
Assembly, District 34
Pro Se
663 Main Avenue
Passaic, New Jersey 07055

SUPREME COURT OF NEW JERSEY
A-104 September Term 1974

KENNETH ROBINSON, an infant, by his parent and guardian ad litem, ERNESTINE ROBINSON, et al.

Plaintiffs-Respondents,

v.

WILLIAM T. CAHILL, Governor of the State of New Jersey, et al.

Defendants-Appellants.

Argued March 18, 1975 -- Decided May 23, 1975

On appeal from Superior Court, Law Division; on rehearing as to remedy.

The opinion of the Court was delivered by HUGHES, C.J.

The Court has now come face to face with a constitutional exigency involving, on a level of plain, stark and unmistakable reality, the constitutional obligation of

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the Court to act. Having previously identified a profound violation of constitutional right, based upon default in a legislative obligation imposed by the organic law in the plainest of terms,[1] we have more than once stayed our hand, with appropriate respect for the province of other Branches of government. In final alternative, we must now proceed to enforced the constitutional right involved.

The compulsion upon the Court to act in the present state of affairs is evident:

> The people's constitutional reposition of power always carries with it a mandate for the full and responsible use of that power. When the organic law reposes legislative power in that branch, for instance, it is expected that such power will be used, lest it wither and leave the vacuum of a constitutional exigency, requiring another branch (however reluctantly)

to exercise, or project the exercise of, that unused power for the necessary vindication of the constitutional rights of the people. Robinson v. Cahill, 62 N.J. 473 (1973) cert. den. sub nom. Dickey v. Robinson, 414 U.S. 976, 94 S.Ct. 292, 38 L.Ed. 2d 219; Jackman v. Bodine, 43 N.J. 453 (1964); Asbury Park Press, Inc. v. Woolley, 33 N.J. 1 (1960). (American Trial Lawyers v. N.J. Supreme Ct., 66 N.J. 258, 263)

In Robinson v. Cahill, 62 N.J. 473 (1973), we held violative of the Education Clause of the Constitution the existing system of education provided public school children in this State. We construed the Constitution basically to command that the State afford "an equal educational opportunity for children" (Id. at 513), however the burden of doing so would be distributed and borne,[2] and we agreed with the determination of Judge Botter (118 N.J. Super. 223, 119 N.J. Super. 40 (Law Div. 1972)) that "the constitutional demand had not been met **" on the basis of gross "discrepancies in dollar input (expenditure) per pupil." 62 N.J. at 515. We so ruled because

dollar input "was plainly relevant and because we (had) been shown no other viable criterion for measuring compliance with the constitutional mandate." Id. at 515-16.[3]

Thus we considered as the principal cause of the constitutional deficiency the substantial reliance (under our present system of financing education) upon local taxation, entailing as it does "discordant correlations between the educational needs of the school districts and their respective tax bases." Id. at 520.

Nevertheless, although we expressed doubt that the Constitution could be satisfied "by reliance upon local taxation" (Id. at 520), we did not foreclose that

possibility. We indicated that the State could meet its obligation by financing education either on a statewide basis, with funds provided by the State, or, in whole or in part, by delegating the fiscal obligation to local taxation. Id. at 509-13. Should it choose the latter alternative, however, it would be incumbent upon the State, either legislatively or administratively "to define *** the educational obligation and *** compel the local school districts to raise the money necessary to provide that (equal educational) opportunity." Id. at 519 (emphasis in the original). If local government fails in that endeavor "the State must itself meet its continuing obligation." Id. at 513. The State aid

plan under the current statute, N.J.S.A. 18A:58-4 (L. 1970, c. 234, hereafter the 1970 Act), was found inadequate because "not demonstrably designed to guarantee that local effort plus the State aid will yield to all the pupils in the State that level of educational opportunity which the *** (Constitution) mandates." Id. at 519.

We concluded our opinion by ruling that relief would be prospective in nature, and we invited argument as to whether, pending legislative action, the judiciary could properly order redistribution of "minimum support" and "save-harmless" aid, infra, differently from the provisions of existing law, in furtherance of the constitutional imperative as the trial court had

directed. Id. at 520-21; see 118 N.J. Super. at 280-81.

After hearing the parties and the amici (and pausing in deference to the doctrine of separation of powers in government), we decided that the statutory scheme would not be disturbed unless the Legislature failed by December 31, 1974, to enact legislation compatible with the Constitution and to be effective as of July 1, 1975. Robinson v. Cahill, 63 N.J. 196, 198 (1973). We withheld a ruling as to whether, if such legislation were not adopted, "the Court (might) order the distribution of appropriated moneys toward a constitutional objective notwithstanding the legislative directions." Id.

Despite considerable efforts by both the Executive and Legislative Branches, no legislation was adopted by December 31, 1974, nor has been to date, although such efforts, it is asserted, continue.

Numerous motions for intervention and for relief and directions by the Court were filed by various parties both before and after December 31, 1974. On January 23, 1975, we entered an order denying all motions for relief or directions and making appropriate provision for hearing certain petitioners for intervention as amici curiae. We decided that in view of the time-exigency (and with continued deference to the separation of powers, we must note) the Court would not disturb the present statutory scheme for

for the school year 1975-1976 but would receive further briefs and hear argument on March 18, 1975, concerning appropriate remedial action by the Court in various suggested particulars in relation to the school year 1976-1977 and subsequent years, looking to a "final determination as to remedies" by the Court in sufficient time to apprise each district by October 1, 1975, what the "State aid situation will be as to it, so far as practicable, for the school year 1976-77."

We have received and carefully considered numerous briefs and exhibits and have heard extensive arguments. It is unnecessary for purposes of our present disposition of the matter to outline in

any detail all the positions taken. They range from pleas by representatives of the General Assembly and the Senate that the Court continue to stay its hand, on the postulate that a solution of the constitutional problem is exclusively for the Legislature and will one day be achieved by it, to diverse proposals for the present adjudication by this Court of all the substantive components of a thorough and efficient education and the financing thereof. They include proposals (which are somewhat varied in nature) by plaintiffs and by the Governor of the State for redistribution of existing State aid for at least the school year 1976-1977 (in furtherance of the constitutional

objective) pending legislative action. And they variously support or criticize quidelines propcsed by the State Department of Education and recently published in 7 New Jersey Register 132 (April 1975), for the attainment by school districts of the goals of a thorough and efficient education.

Much of the material submitted by the parties and amici has been helpful to the Court, and was invited by the broad terms of the order of January 23, 1975. However, upon thorough deliberation on the matter, we have concluded that our present disposition should not extend beyond the delineation of a provisional remedy for the school year 1976-1977 should the other Branches of government fail to devise and

enact a constitutional system of education in time for its effectuation for that school year.[4]

We do not now go further for several reasons. We continue to be hesitant in our intrusion intc the legislative process, forced only so far as demonstrably required to meet the constitutional exigency. As well, it would be premature and inappropriate for the Court at the present posture of this complex matter to undertake, a priori, a comprehensive blueprint for "thorough and efficient" education, and seek to impose it upon the other Branches of government. Courts customarily forbear the specification of legislative detail, as distinguished from

their obligation to judge the constitutionality thereof, until after promulgation by the appropriate authority. Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 2d 484 (1972). We have been as explicit as we reasonably could as to the nature of the constitutional deficiencies seen to exist in the present system. There is no responsible dissent from the view that implementation of the constitutional command is peculiarly a matter for the judgment of the Legislature and the expertise of the Executive Department. In other words, the Court's function is to appraise compliance with the Constitution, not to legislate an educational system, at least if that can

in any way be avoided. We have measured and found wanting the existing scheme. No other is yet before us for adjudication.

Nor can we adjudicate on a piecemeal or hypothetical basis. The validity of the tentative guidelines recently published by the Department of Education cannot now be passed upon, inchoate and hortatory in nature as they are. They would have to be considered in context with such legislative provision as may be enacted for their fiscal implementation, unless the judgment of this Court is likewise to be only hortatory and futile in that sense.

Moreover, as already indicated, our opinion in Robinson, 62 N.J. supra, noted the broad options open to the Legislature

in discharging the constitutional requirement. Subject to the caveats there noted and here repeated, the selection of the means to be employed belongs to the other Branches of government, unimpeachable so long as compatible with the Constitution. See, A. & B. Auto Stores of Jones St., Inc. v. Newark, 59 N.J. 5 (1971); Ind. Elec. Assoc. of N.J. v. N.J. Bd. of Exam., 54 N.J. 466 (1969); Burton v. Sills, 53 N.J. 86 (1968); N.J. Chapt., Am. I.P. v. N.J. State Bd. of Prof. Planners, 48 N.J. 581 (1967); Two Guys from Harrison, Inc. v. Furman, 32 N.J. 199 (1960).

We take this occasion to state our approval of the ongoing efforts of the Department of Education to establish the

components of a thorough and efficient system of education by formulation of standards, goals and guidelines by which the school districts and the Department may in collaboration improve the quality of the educational opportunity offered all school children. We assume that these efforts will move forward through the administrative process to a finality, and that the State, through the Commissioner of Education, will see to the prompt implementation of the standards, so determined, in the field. We would further expect that any problem attendant upon undue burdens on particular districts, in conforming to such standards, will have legislative attention. But by these comments we intend no present implication

that any method of financing for the purposes stated, which would leave the present system of defraying the expense of education substantially unaltered, could fulfill the "thorough and efficient" constitutional norm.

What we have already said is not, of course, to imply that the provisional remedy for the year 1976-1977 we hereinafter order represents our concept of the full reach of our power, duty or responsibility in effectuating the promise of the Constitution to the school children of the State should the other Branches delay action beyond availability of a remedy in time for the school year 1977-1978. Nor does it at all imply compliance by itself

with the constitutional standards. We reserve such questions for the appropriate occasion, which hopefully will not occur.

We thus turn to the question of an appropriate contingent or provisional remedy for at least the school year 1976-1977. We forthwith reject the submission that we should do nothing. It is past three years since the system was held unconstitutional in the Law Division. Our position that the court would act at least for 1976-1977 was implicit in the January 23, 1975, order. The need for immediate and affirmative judicial action at this juncture is apparent, when one considers the confrontation existing

between legislative action, or inaction, and constitutional right. When there occurs such a legislative transgression of a "right guaranteed to a citizen, final decision as to the invalidity of such action must rest exclusively with the courts. It cannot be forgotten that ours is a government of laws and not of men, and that the judicial department has imposed upon it the solemn duty to interpret the laws in the last resort. However delicate that duty may be, we are not a liberty to surrender, or ignore, or to waive it." Asbury Park Press, Inc. v. Woolley, 33 N.J. 1, 12 (1960). We have mentioned inaction as well as action in importing constitutional violation, for as stated

by Justice Proctor in Cooper v. Nutley Sun Printing Co., Inc., 36 N.J. 189, 196 (1961) (adverting to the opinion of Chief Justice Marshall in Marbury v. Madison, 1 Cranch 137, 163, 2 L.Ed. 60, 69 (1803)):

> *** (J)ust as the Legislature cannot abridge constitutional rights by its enactments, it cannot curtail them through its silence. *** The Judicial obligation to protect the rights of individuals is as old as this country. (36 N.J. at 196; citations omitted)

If then, the right of children to a thorough and efficient system of education is a fundamental right guaranteed by the Constitution, as we have already determined, it follows that the court must "afford an appropriate remedy to redress a violation of those rights. To find otherwise would be to say that our

Constitution embodies rights in a vacuum, existing only on paper." Cooper v. Nutley Sun Printing Co., Inc., supra, at 197.

We have given serious consideration to the idea of enjoining all State aid under the present unconstitutional system. That recourse would simplify the weighty problem of judicial power, as there is a concession by all that the Court may, and ordinarily should, enjoin the administration of a patently unconstitutional plan. But we are convinced that so radical a curtailment of obviously essential State assistance to the school districts and its consequent harmful impact on vital educational programs, even if only for one provisional year, is not justified at this time in the light of all pertinent considerations.

The provisional remedy for the school year 1976-1977 we have decided upon follows, in principle if not in scope, the proposal for redistribution of State aid funds advocated before us by the Governor. The Governor's plan, presented as "the appropriate next step in this significant interchange between coordinate branches," would enjoin the present statutory distribution and distribute to the school districts more conformably to the constitutional norm the following categories of State aid funds:

1. Minimum support aid (N.J.S.A. 18A:58-5a) ($234,000,000 as of 1974-1975);

2. Save-harmless funds (N.J.S.A. 18A:58-18.1) ($7,600,00 as of 1974-1975);

3. Building aid, foundation program (N.J.S.A. 18A:58-23, 24) ($27,000,000 as of 1974-1975);

4. Atypical pupils aid (N.J.S.A. 18A:58-6) ($64,000,000 as of 1974-1975);

5. Transportation aid (N.J.S.A. 18A:58-7) ($46,000,000 as of 1974-1975);

6. Pension fund contributions by the State (N.J.S.A. 18A:66-1, et seq.) ($172,000,000 as of 1974-1975).

Thse items aggregate about $550,000,000 at the 1974-1975 level of appropriations. Under the proposed State budget for 1975-1976 those items would, for that year, total about $585,000,000. What they will amount to for 1976-1977 is not yet known. Minimum support aid provided in 1975-1976 $150 per resident weighted pupil in operating districts. Save-harmless aid

assures every district no less aid for current expenses and building costs than it received in the school year 1972-1973. The titles of the other aid categories are self-explanatory. It is estimated that minimum support aid for 1976-1977 would approximate $165 per pupil.

The Governor proposes redistribution of all such funds in accordance with the incentive equalization aid formula of the relevant sections of the 1970 Act (N.J.S.A. 18A:58-5b, 6.3), the operation of which was described in our prior opinion. 62 N.J. at 517-18. Essentially, that formula fixes a "guaranteed" equalized assessed valuation per weighted pupil (currently $43,000), and if the school district's

actual corresponding valuations per pupil multiplied by the number of pupils there resident is less than the guaranteed valuations per pupil multiplied by the same number, the district receives State aid to the extent of the difference, multiplied by the net operating school tax rate. If the actual valuations are more than the guaranteed valuations no formula aid is given.

The Governor's position (and to this extent plaintiffs agree) is that the six categories of State aid enumerated, as presently distributed, are not compatible with the Robinson criterion of equality of educational resources for the pupils, whereas the incentive equalization formula

is. He therefore urges that the whole be redistributed solely on the basis of the latter formula. Rough calculations offered on his behalf prior to argument purported to indicate that if applied for the year 1975-1976, this would have lifted the guaranteed valuation rate per pupil from the then existing $43,000 to a figure ranging from $66,000 to $72,000, depending upon the amount of appropriations for that year. If applied for the year 1976-1977 the figure would be larger because of increasing budgets and equalized valuations.

We are in accord with the Governor and plaintiffs as to the effect of redistribution of minimum support and save-harmless

aid in accordance with the 1970 incentive equalization aid formula in tending to subserve the goal of equality of educational opportunity. The gwo named items leave existing arbitrary ratios of tax resources per pupil unaffected. The formula, on the other hand, in effect places all districts whose actual equalized valuations are below the guarantee-level on the same per-pupil basis in respect of supporting tax resources. The higher the guarantee-level the more districts come under the umbrella of such equality. Since reallocating minimum support and save-harmless funds to formula aid purposes does lift the guarantee-level, equality of supporting resources

per-pupil is fostered in that way.

We think, however, that the merits of the attack upon the relevance of items 3, 4 and 5 mentioned above to permissible constitutional standards is not as manifest, if sustainable at all, as in the case of minimum support and save-harmless aid. As to pension contribution aid, while this shares the asserted and justified characterization of the last mentioned items, we conclude that redistribution thereof at this juncture would be inadvisable. We believe there would be substantial legal and administrative confusion as to where responsibility would lie for raising employers' pension contributions under existing legislation

if the legislative appropriations for that purpose were enjoined, not to mention risks to the solvency of the Teachers' Pension and Annuity Fund. Teacher and pensioner morale is a pertinent factor for consideration.

It is our order, consequently, that for the school year 1976-1977, in the contingency aforestated, minimum support aid and save-harmless funds shall not be disbursed as provided under the existing statutes, but shall be distributed in accordance with the incentive equalization aid formula of the 1970 Act. It is estimated these funds will approximate $290,000,000. According to calculations furnished us by the Department of

Education, this should result, for the year stated, in guaranteed equalized valuations per weighted pupil of about $67,000.

We are not insensitive to the earnest pleas of those municipalities which will be disadvantaged by the redistribution here ordered because they have actual equalized valuations per pupil exceeding the prospective guaranteed valuations, yet are burdened by school populations requiring more than average expenditures per pupil and perhaps some degree of extraordinary non-school burden (municipal overburden). The Department of Education has furnished us and the parties with a schedule of the respective gains and

losses for 1976-1977 of the redistribution here ordered, and we have carefully weighed its effect. We have given consideration to a variety of possible adjustment factors, such as for municipal overburden, which might be applied to render this redistribution more theoretically equitable. Having regard to the urgen necessity of announcing our disposition at the earliest date possible, and the debatability, complexity and uncertainty in effect of any adjustment factor which might be so considered, we have foregone efforts at refinement of the approach selected.

Study of the figures discloses a broad range of correlation between the gaining

districts and districts having higher than statewide average school and general tax rates (equalized); vice versa as to the losing districts. (Concededly, these correlations are not invariably uniform.) Similarly, the gaining districts are generally the more urban areas, particularly afflicted by municipal overburden, and the rural districts, obviously ratables-poor. The remedy we apply is only for one year, and however short of a perfect plan, is at least attainable and a positive step toward the end result of full constitutional compliance. In any case, it is to be kept constantly in mind that our order may be averted by timely and adequate legislative and administrative action.

In sum, the present disposition represents our best present judgment as to an appropriate provisional and interim accomodation of the interests of the other Branches in their right to try to achieve accomplishment of the mutually desired constitutional remedy, of the interests of the school districts in providing adequate education in the meantime for their pupils, and of the solemn duty of this Court to enforce the Constitution.

In opposition to such action by the Court as thus ordered, it has been urged upon us on behalf of the Senate that the "judicial power of the State does not encompass within it the power to redistribute funds appropriated by law even

if in furtherance of a constitutional objective." This conclusion is erected upon the subordinate hypotheses (a) that under the literal terms of the Education Clause it is the Legislature and only the Legislature which has the power and right to provide for a system of thorough and efficient education; and (b) Art. VIII, Section 2, Paragraph 2 provides that "no money shall be drawn from the State Treasury but for appropriations made by law" and that "(a)ll moneys for the support of State Government and for all other State purposes as far as can be ascertained or reasonably foreseen, shall be provided for in one general appropriations law covering one and the same fiscal year *** ."

The first premise is unacceptable on its face. The people in 1875 ordained the Legislature to be their agent to effectuate an educational system but did not intend to tolerate an unconstitutional vacuum should the Legislature default in seeing to their specification that the system be thorough and efficient. See Asbury Park Press, Inc. v. Woolley, supra. We have adjudicated such a default. Under emerging modern concepts as to judicial responsibility to enforce constitutional right there has been no paucity of examples of affirmative judicial action toward such ends. Jackman v. Bodine, 43 N.J. 453 (1964); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 91 S. Ct. 1267,

28 L.Ed. 2d 554 (1971); Griffin v. School Bd. of Prince Edward County, 337 U.S. 218, 233-34, 84 S.Ct. 1226, 12 L.Ed. 2d 256, 266-67 (1964); Hawkins v. Shaw, Mississippi, 437 F. 2d 1286 (5th Cir. 1971); Kennedy Park Homes Ass'n v. Lackawanna, N.Y., 436 F. 2d 108 (2d Cir. 1970), cert. den. 401 U.S. 1010, 91 S.Ct. 1256, 28 L.Ed. 2d (1971); Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972).

In the Mills case, supra, the Court held that constitutional right, inter alia, dictated that handicapped children were entitled to publicly supported education only, were insufficient to encompass the special need, there would have to be an equitable reallocation of the available

funds toward that constitutional imperative. Thus, in order to enforce the Constitution, the judicial branch of the federal government reallocated funds differently from the appropriation thereof by the co-equal legislative branch of the same sovereignty. 348 F. Supp. at 876. The principle announced is directly apposite here.

In the Jackman case, supra, notwithstanding that our Constitution, as construed, authorized the Legislature to initiate the machinery for constitutional reformation of the system of legislative representation, and it would ordinarily be patently improper for the Court to do so, the judicial power was nevertheless invoked in

the circumstances there obtaining. Legislative systems of representation of the people like New Jersey's having been held by the federal courts in violation of equal protection, a new system was required to be devised. The Court said:

> The duty to comply with the equal protection clause rests upon the three branches of State Government and upon the people of the State as well. The question is what part must be played by each.
>
> We think it clear that the judiciary should not itself devise a plan except as a last resort ***.
> (43 N.J. at 473)

The Court fixed time limits for effectuation by the Legislature of a temporary plan for a constitutional system of legislative representation to

meet the exigency of imminent elections, and plainly implied it would itself adopt and enforce a plan if the Legislature did not do so in time. Jackman v. Bodine, 44 N.J. 312, at 316-17. See also Asbury Park Press, Inc. v. Woolley, supra, and particularly the concurring opinion of Justices Proctor and Schettino, 33 N.J. at 22, expressing a willingness to entertain an application for the court itself to order a reallocation of county representation in the General Assembly if the Legislature failed to do so, where population changes in the counties had made the existing allocation unconstitutional.

As to the Senate's reliance upon Art.

VIII, Section 2, Paragraph 2, the argument assumes there is a clash with the Education Clause, and the contention is that the former provision controls. We doubt the premise. The order we are making as to use of a portion of the State aid moneys in 1976-1977 does not call for the expenditure of appropriations not made by law. The funds, ex hypothesi, will be appropriated by the Legislature. They will still be used for educational purposes, but in a manner we have concluded to be an essential and minimal interim step in the enforcement of the Education Clause. If there remains a theoretical conflict between the strictures of the Appropriations Clause and the

mandate of the Education Clause, we hold the latter to be controlling in these circumstances.

The argument is recast in terms of the doctrine of separation of powers, purportedly precluding judical direction for expenditure of State moneys, that being exclusively for the judgment of the other Branches. Cited are such decisions as Willis v. Dep't of Cons. & Ec. Dev., 55 N.J. 534, 536 (1970) and Fitzgerald v. Palmer, 47 N.J. 106, 108 (1966). These decisions essentially dealt with the extent of the judicial power to award or enforce money judgments or claims against the State or State agencies out of unappropriated moneys. They have limited

pertinence here. The interest here at stake transcends that of an ordinary individual claimant against the State. It is that of all the school children of the State, guaranteed by the constitutional voice of the sovereign people equality of educational opportunity.

This Court, as the designated last-resort guarantor of the Constitution's command, possesses and must use power equal to its responsibility. Sometimes, unavaoidably incident thereto and in response to a constitutional mandate, the Court must act, even in a sense seem to encroach, in areas otherwise reserved to other Branches of government. Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed. 2d 491 (1969). And while the

court does so, when it must, with restraint and even reluctance, there comes a time when no alternative remains. That time has now arrived.

So clearly does our constitutional duty bespeak the present obligation of affirmative judicial action, that we have no doubt that the order we now make is constitutionally minimal, necessary and proper.

The State Treasurer, the State Commissioner of Education and any other State officers concerned with the receipt or disbursement of moneys to be appropriated by the Legislature for local educational purposes for the school year 1976-1977 are hereby enjoined from disbursing minimum support and save-harmless

funds designated by this opinion in accordance with existing law, and are directed to distribute and disburse said funds in accordance with the incentive equalization aid formula of N.J.S.A. 18A:58-5b, 6.3. These directions of course are subject to the contingency set forth in this opinion, namely the possible eventuation of timely and constitutionally appropriate legislative action.

So ordered; supplemental directions or relief may be applied for on notice. We retain jurisdiction.

For the Order: Chief Justice HUGHES, Justices SULLIVAN, PASHMAN and SCHREIBER and Judge CONFORD - 5.

Against the Order: Justices

MOUNTAIN and CLIFFORD - 2.

Majority Opinion
Footnotes

1 "The Legislature shall provide for the maintenace and support of a thorough and efficient system of free public schools for the instruction of all school children in the state *** ." (N.J. Const. (1947), Art. VIII, Section 4, Paragraph 1; see N.J. Const. (1844), Art. IV, Section 7, Paragraph 6, as amended, effective Sept. 28, 1875)

2 " *** (I)t cannot be said the 1875 amendments were intended to insure statewide equality among taxpayers. But we do not doubt that an equal educational opportunity for children was precisely in mind. The mandate that there be maintained and supported 'a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years' can have no other import. Whether the State acts directly or imposes the role upon local government, the end product must be what the Constitution commands. A system of instruction in any district of the State which is not thorough and efficient falls short of the constitutional command. Whatever the reason for the violation, the obligation is the

is the State's to rectify it. If local government fails, the State government must itself local government cannot carry the burden, the State must itself meet its continuing obligation." (Robinson v. Cahill, supra at 513)

3 While we recognized "that there is a significant connection between the sums expended and the quality of the educational opportunity" (62 N.J. at 481), the record of this case and the material furnished us in preparation for argument demonstrate that a multitude of other factors play a vital role in the educational result--to name a few, individual and group disadvantages, use of compensatory techniques for the disadvantaged and handicapped, variation in availability of qualified teachers in different areas, effectiveness in teaching methods and evaluation thereof, professionalism at every level of the system, meaningful curricula, exercise of authority and discipline, and adequacy of overall goals fixed at the policy level. Hence while funding is an undeniable pragmatic consideration, it is not the overriding answer to the educational problem, whatever the constitutional solution ultimately required.

Moreover, while we dealt with the

constitutional problem in terms of dollar input per pupil, we recognized the legitimacy of permitting any school district wishing to do so to spend more on its educational program through local effort (local "leeway") provided such did not become "a device for diluting the State's mandated responsibility." (62 N.J. at 520)

4 We do not at this juncture assume such a timely plan will not be forthcoming. Progress in that direction has already been made by the Department of Education and effort continues in the Legislature. If implementing legislation for financing and the attendant administrative process is completed before October 1, 1975, but not in time to permit review thereof by the Court by that date, the Court will then, in the light of the nature of the entire plan submitted, consider whether it may be permitted to go into effect for 1976-1977, with or without terms, or be deferred to subsequent years if ultimately sustained by the Court.

PASHMAN, J. (concurring in part only and dissenting).

Two years ago, when in Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973) (Robinson I) this Court held the system of school finance presently in operation in New Jersey violative of the education clause of the Constitution of 1947, N.J. Const. (1947), Art VIII, Section I, Paragraph 1, it chose to postpone imposition of a remedial order until January 1, 1975 so as to give the Legislature a reasonable period in which to satisfy the mandates of the Constitution. Robinson v. Cahill, 63 N.J. 196, 306 A.2d 65 (1973) (Robinson II). Earlier

this term the Court again declined to impose an immediate remedial order in the expectation that the Legislature would perform its constitutional duties. Robinson v. Cahill, 67 N.J. 35, 335 A.2d 6 (1975) (Robinson III). The effect of this exercise of judicial self-restraint (which I considered unwarranted even at the time, see Robinson III, supra at 40, 335 A2d 6 (Pashman J. dissenting) has been to delay implementationf of any substantial relief until the 1976-77 school year, at the earliest.

By its terms the education clause imposes on the Legislature the primary duty to "provide for the maintenace and support of a thorough and efficient

system of free public schools." In permitting the grave constitutional violations recognized remedied for so long, the Court has sought to render every possible deference to the primacy in this field granted to the Legislature by the Constitution. The Legislature, however, has not acted. We have long since reached the point beyond which continued toleration by this Court of the status quo would implicate the Court itself in these constitutional violations, see Robinson III, supra at 42-44, 335 A.2d 6 (Pashman, J. dissenting), for the judicial branch has an affirmative duty to act to protect the rights of citizens which are guaranteed by the Constitution,

even -- perhaps especially -- face of the legislative inaction. Cooper v. Nutley Sun Publishing Co., 36 N.J. 189, 196-97, 175 A.2d 639 (1961); King v. South Jersey National Bank, 66 N.J. 161, 177, 330 A.2d 1 (1974) (dictum); see Asbury Park Press, Inc. v. Woolley, 33 N.J. 1, 161 A.2d 705 (1960).

Some may have constured the Court's reluctance to impose a remedial order as abandonment of the constitutional principles announced in Robinson I. Such a construction would mistake judicial respect for the spirit of the constitutional principle of separation of powers for loss of judicial will to vindicate rights guaranteed by the Constitution. No error could be greater. Today's decision,

despite its other shortcomings, is evidence that this Court remains resolved to exert its remedial powers to rectify the violations of the education clause identified in Robinson I. To fail to do so would involve a profound abdication by the Court of its constitutional responsibilities.

Necessarily, this course will carry the Court into hitherto unexplored territories in the realms of constitutional law and equitable remedies. It is a course, however, which was implicit and foreseen in our prior decisions in this matter. See Robinson I, supra, 62 N.J. at 520-21, 303 A.2d 273; Robinson II, supra, 63 N.J. at 198, 306 A.2d 65; Robinson III, supra, 67 N.J. 37-38,

335 A.2d 6. The fact that such a course requires investigiation of novel and difficult questions of law, see, e. g., Jackman v. Bodine, 43 N.J. 453, 205 A.2d 713 (1964); Asbury Park Press, Inc. v. Woolley, supra, or that it may require the Court to make controversial or unpopular decisions, Ridgefield Park v. Bergen County Board od Taxation, 31 N.J. 420, 431, 157 A.2d 829 (1960); cf. Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958), is no grounds for turning aside.

I concur in the general decision of the Court to order some form of relief for the 1976-77 school year and in its determination that it has the power to

enjoin the distribution of "save-harmless aid" and of "minimum pupil aid" under the Bateman Tanzman Act, N.J.S.A. 18A:58-1 et seq., and to order redistribution of those moneys in accordance with the more equalizing "incentive-equalization" formula contained in N.J.S.A. 18A:58-5(b), as a first step toward remedying present violations of the education clause.

In my opinion, however, this remedy, while within the powers of the Court and adopted with a proper spirit of commitment to ultimate implementation of the education clause, is not commensurate with the magnitude and importance of the wrong. I would order relief both broader in scope and calculated to more directly

implement the mandates of the education clause as construed by our prior decisions in this case.

I

This case concerns the inequality of educational opportunity that has resulted from the wide disparities in resources devoted to educational purposes in the various local school districts in New Jersey. In Robinson I, supra, the Court did not hold that disparate educational expenditures were ipso facto unconstitutional as a matter of constitutional equal protection. 62 N.J. at 482-501, 303 A.2d 273; cf. West Morris Regional Bd. of Education v. Sills, 58 N.J. 464, 279 A.2d 609 (1971), cert. denied 404 U.S. 986, 92 S.Ct. 450, 30 L.Ed.2d 370

(1971). Rather the Court found that N.J. Const. (1947), Art. VIII, Section I, Paragraph 1 imposed upon the State the duty to insure that a certain minimum level of educational opportunity is provided every student.[1] 62 N.J. at 513-15, 303 A.2d 273. It held that while the State may delegate the actual administration of the public schools to local school districts, it cannot delegate the ultimate responsibility for "maintain(ing) a thorough and efficient system of school finance was identified by the Court as abdication by the State of this responsibility.

(I)f the State chooses to assign its

obligation under the 1875 amendment to local government, the State must do so by a plan which will fulfill the State's continuing obligation. To that end the State must define in some discernible way the educational obligation and must compel the local school districts to raise the money necessary to provide that opportunity. The State has never spelled out the content of the constitutionally mandated educational opportunity. Nor has the State required the school districts to raise moneys needed to achieve that unstated standard. Nor is the State aid program designed to compenstate for local failures to reach that level. * * * (62 N.J. at 519, 303 A.2d at 297; emphasis in the original).

Thus the education clause requires that the State, having chosen to delegate administration of public schools to local school districts, must prescribe statewide standards for the operation of those schools so as to insure that all children are guaranteed an opportunity for an education of a certain minimum quality. It must also establish a mechanism for compelling local compliance with such standards, and where, for financial reasons, a local school district cannot comply, it must provide a means for supplementing local resources. 62 N.J. at 513, 519, 303 A.2d 273.

In the present case, the failure of the State to promulgate and enforce such standards for educational quality

has permitted the development of great disparities in the amount of resources devoted in the various ties which appear to have no educational justification and which are not responsive to the constitutional mandate of the maintenance of a "thorough and efficient" system of schools throughout the State but rather are merely a reflection of the great disparities in relative wealth of the various school districts. 62 N.J. at 515-20, 303 A.2d 273.

The ultimate object of any relief ordered by this Court must be to compel the State to assume these duties, which, to the grave injury of many children in this State, have gone long neglected.

Until the State has at least adopted proper statewide standards, it is impossible for this Court to even determine to what degree the present disparities are resulting in inadequate education in some districts, although the findings of the trial court put it beyond question that lack of sufficient expenditures for education is seriously harming students in at least some school districts. Robinson v. Cahill, 118 N.J.Super. 223, 246-68, 287 A.2d 187 (Law Div. 1972).[2] In the interim, the Court must move to eradicate at least the grossest disparities.

The redistribution of State "save-harmless" and "minimum pupil" aid ordered today is a step, albeit a small one,

toward the accomplishment of such interim relief. Regrettably, the Court has not gone farther and redistributed all State aid to education and has chosen to rely exclusively upon the so-called "incentive equalization" formula, N.J.S.A. 18A:58-5(b), as its mechanism for reallocation of those funds which it does redistribute, without attempting to remedy the substantial shortcomings of that formula itself. More regrettably still, the Court has failed in today's decision to deal with ultimate constitutional violations at issue here. It has not acted at all to compel the promulgation of statewide standards of educational quality, an essential first step in remedying those

violations, but has merely contented itself with interim relief, dealing only with the grossest symptoms of the failure of the State to meet its obligations and even with those only for a single year.

II

The education clause imposes initial responsibility for formulation of statewide standards of educational quality upon the Legislature and, by implication, upon administrative agencies to which the Legislature properly delegates its authority. N.J. Const. (1947), Art. VIII, Section IV, Paragaph 1. These bodies have broad discretion in defining those standards. It is not appropriate

for the judiciary, which has no special expertise in matters of educational policy, to interfere with the exercise of this discretion except where the executive and legislative branches have altogether failed to establish standards or where the standards which have been established are plainly insufficient to meet the requirements of the Constitution.

The Legislature has expressly delegated the responsibility for supervision of the quality of the public schools to the State Board of Education and its administrative officer, the Commissioner of Education. N.J.S.A. 18A:4-10, 18A:4-15, 18A:4-23, 18A:4-24. The Board and Commissioner are expressly authorized to

inquire into the "thoroughness and efficiency" of any public school and to conduct any necessary tests and examinations:

N.J.S.A. 18A:4-24

> The Commissioner shall, by direction or with the approval of the state board, whenever it is deemed to be advisable so to do, inquire into and ascertain the throughness and efficiency of operation of any of the schools of the public school system of the state and of any grades therein by such means, tests and examinations as to him seem proper, and he shall report to the state board the results of such inquiries and such other information with regard thereto as the state board may require or as he shall deem proper, but nothing in this section shall affect the right of each district to prescribe its own rules for promotion.

The Board is also expressly authorized to promulgate, N.J.S.A. 18A:4-15, and the

Commissioner to enforce, N.J.S.A. 18A:4-23, rules and regulations implementing the education clause of the State Constitution. The powers of the Board and Commissioner under these statutes have in the past been construed very bradly. See Jenkins v. Morris Tp. School District, 58 N.J. 483, 279 A.2d 619 (1971); East Brunswick Tp. School Board v. East Brunsiwkc Tp., 48 N.J. 94, 223 A.2d 481 (1966); cf. State Bd. of Education v. Netcong Bd. of Education, 108 N.J. Super. 564, 571-73, 262 A.2d 21 (Ch.Div. 1970), aff'd 57 N.J. 172, 270 A.2d 412 (1970), cert. den. 401 U.S. 1013, 91 S.Ct. 1253, 28 L.Ed.2d 550 (1971). The Board and Commissioner are

thus statutorily empowered to formulate statewide standards of educational quality as well as being uniquely qualified to do so.

Therefore, while retaining jurisdiction in this Court, I would remand the case in part to the State Board of Education to formulate statewide standards for educational quality and to evaluate each school district to determine whether it is in compliance with those standards[3] and, if not in compliance, whether the district has the financial ability to comply without further State assistance.[4]

The type of standards required by the education clause may be inferred from the language of that clause and the cases interpreting it. "Thoroughness" and

"efficiency" are ultimately measures of the effectiveness of the public school system in performing its function -- educating the children who attend it. The former Supreme Court characterized the significance of the education clause in the following terms:

> Its purpose was to impose on the legislature a duty of providing for a thorough and efficient system of free schools, capable of affording to every child such instruction as is necessary to fit it for the ordinary duties of citizenship.* * * (Landis v. Ashworth, 57 N.J.L. 509, 512, 31 A. 1017, 1018 (Sup.Ct.1895).

Similarly, in Robinson I, we said:

> The Constitution's guarantee must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market. (62 N.J. at 515, 303 A.2d at 295).

The statewide standards[5] must, therefore, be cast in terms of the equality of education which the local school districts are actually providing to the students who attend them.[6]

That this type of standard is mandated by the constitution implies neither that other types of standars may not also be convenient and free of difficulties. Indeed the Commissioner has urged upon the Court the practical and theoretical obstacles to adopting and enforcing standards focused directly upon the question of whether public schools are in fact educating the students who attend them.[7] Nevertheless, that question is precisely the one that is of most importance to children, their parents,

and, ultimately, to society as a whole.[8]

The product of such a remand would be both a set of standards and an evaluation of how much additional money would be needed to establish a "thorough and efficient" system of public schools in all school districts. I would set a timetable for the remand so as to enable the Court to hear any appeals from the decisions of the Board and to take any steps necessary to compel implementation of the Board's decisions (with modifications by the Court, if any) for the 1976-77 school year. I would expect the Board to fully comply with the mandate of the Court upon such a remand in time for implementation of the Board's decisions in the 1976-77 school year.

At that time, it would be proper for the Court to consider what would be the most appropriate mode of exercising its power to compel provision of any additional resources needed to implement the mandates of the education clause if the Legislature had not acted in the meantime. See generally Robinson III, supra, 67 N.J. at 40-41, 335 A.2d (Pashman, J. dissenting).

Such a remand, designed to lead to implementation of the mandates of the education clause beginning in the 1976-77 school year rather than at some indeterminate future date, seems to me both fully within the practical capacities of the State Board of Education

and better calculated to fully remedy the constitutional violations identified in Robinson I than does imposition of mere interim relief.

III

Had the Court chosen to order a remand of the type outlined above, we would in all likelihood not now be faced with the awkward problem of attempting on an ad hoc basis to eradicate the grossest disparities in educational expenditures. Nevertheless, since the majority has chosen to follow that route, the method it has adopted seems to me to call for some comment.

I have no doubt as to the Court's power to redistribute existing State aid

for education so as to reduce disparities among the various school districts in the resources available for educational purposes. The arguments to the contrary are considered and properly disposed of in the opinion of the majority. Ante at 346-360, 339 A.2d at pp. 200-201.

The education clause, of course, does not require the State to subsidize local inefficiency or waste. Rather the State has a duty to insure that moneys granted to a local school district are in fact properly used by that district to provide a "thorough and efficient" education for its pupils.

Even if I could approve the majority decision to order only interim relief, I

would see no justification for proceeding as gingerly as does the Court today. The net effect of redistributing "save-harmless and "minimum pupil" aid under the "incentive-equalization" formula is disturbingly small. The Commissioner of Education estimates that those categories of aid will total only $303 million[9] in 1976-77 out of a total expenditure for public schools from all sources of $3.03 billion. Only $101 million of the money will actually be shifted from well-to-do districts to poorer ones. Thus we are effecting only about a 3% change in the overall allocation of educational resources.

The majority chooses not to redistribute State pension contributions to the

Teachers' Pension and Annuity Fund, N.J.S.A. 18A:66-33; atypical pupil aid, N.J.S.A. 18A:58-6; building aid, foundation program, N.J.S.A. 18A:58-23, 24 or transportation aid, N.J.S.A. 18A: 58-7, categories of state education aid which totaled approximately $309 million in 1974-75. At best these aid programs fail to respond to the problem of disparities in educational expenditures among districts which result from the gross interdistrict differences in resources available for education purposes, thus diluting the small equalizing effect which the remedy ordered by the Court may have. Some of these programs seem

to have the effect of actually magnifying those disparities. Transportation aid and atypical pupil aid are distributed to districts on the basis of actual costs, regardless of the differing ability of the various districts to obtain funds for these special services from local revenue sources. State pension contributions are made to all districts, which offer higher teacher salaries, than in poorer districts. Distribution of building aid is somewhat better correlated with the relative wealth of the various districts, but the variation in aid among districts is not nearly so great as the disparities in their resources would require. All of

these types of aid contribute more to the problem of disparities in educational expenditure than they do to its solution.[10]

The majority accepts as grounds for not redistributing these categories of aid, and most especially for not redistributing State pension contributions, the argument that including them in the remedial order would lead to "administrative confusion." One might expect that this argument, which has been dusted off, polished up, and put on display by the advocates of the status quo at every stage of this all too prolonged litigation, see e. g., Robinson III, supra, would have begun

to lose its allure.[11] Mere injunction and redistribution of these forms of aid need have no effect on bona fide obligations local districts have to teachers, special students, students needing transportation, or any one else. The sole effect is to shift the burden of financing these obligations from the State to local school districts, which may use any available source of revenue including redistributed State aid. There is no reason to believe that in the full year between now and July 1, 1976, administrative problems in making this shift could not be solved and the feared this shift could not be solved and the feared "confusion" mastered.

Mere administrative inconvenience is paltry grounds indeed for failing to forcefully vindicate rights guaranteed by the Constitution. Cf. Cleveland Board of Education v. La Fleur, 414 U.S. 632, 646, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); Frontiero v. Richardson, 411 U.S. 677, 690, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973).

Nor am I satisfied that the Court has acted wisely in choosing to employ the "incentive-equalization" formula contained in N.J.S.A. 18A:58-5(b) without significant modification as the mechanism for redistributing the State aid which is covered by its order.

The "incentive-equalization" formula

is an example of what is sometimes described as "district power equalizing" formula. See, e. g., Coons, Clune & Sugarman, Private Wealth & Public Education, 202 (1970). Recognizing that a district with a small property tax base cannot provide adequate revenues for education even if it taxes itself very heavily, the "incentive-equalization" formula augments the power of the district to raise revenues by guaranteeing a certain minimum valuation per pupil. Thus, the State grants aid to the district equal to the amount the district would have raised by applying its school tax rate to the difference between the guaranteed valuation per pupil.

The "incentive-equalization" formula is not a pure district power equalizing formula because it also seeks to take into account the fact that the cost of education is not the same for all students. The cost of high school education per pupil is greater than the cost of kindergarten education. A district, many of whose students fall into categories with high per pupil educational costs, may be unable to raise sufficient revenues to meet its educational needs even though another district with the same property tax base and same number of pupils, but whose pupils fall into categories with lower per pupil educational costs, could do so.

Therefore under the "incentive-equalization" formula, pupils are placed into different categories depending on the relative per pupil cost of educating them and pupils are "weighted" in the formula depending upon what category they fall into. N.J.S.A. 18A:58-2. Thus elementary school pupils are given a weighting of 1, kindergarteners are given a weighting of .75 and high school students are given a weighting of 1.3. Rather than providing a guaranteed valuation per pupil, the State under the "incentive-equalization" formula provides a guaranteed valuation per weighted pupil. In particular, the Legislature recognized that some pupils because of cultural, social and economic

circumstances, may require more costly compensatory programs, and gave an additional .75 weighting for each child in the district receiving welfare (AFDC) benefits. See generally, State Aid to School Districts Study Commission, A State School Support Program for New Jersey, 39-40 (1968) (Bateman Report).

There is a third reason why a district, even though it taxes itself heavily, might not be able to raise enough revenues to meet its educational needs. Some areas, particularly urban areas, have exceptionally high non-educational expenses which must be financed through property taxes. Expenses which are exceptionally high in urban areas include

county and municipal welfare, police and fire protection, and sanitation. In these areas, revenues raised by property taxes which might otherwise be used for education, must be diverted to non-educational purposes. In addition, a substantial number of municipalities because of their size, density, and special social problems, have quite properly become involved in developing a broad range of public services, particularly in the area of human health and welfare, not provided by other smaller and more affluent communities. This, too, has contributed to the staggering rise in city expenditures, further eroding the one and the same tax base -- local real estate ratables.

Hence a district situated in an area wh which has a heavy burden of non-education expenses may not be able to meet its educational needs, even though another district with the same property tax-base, the same number of weighted pupils, and the same heavy tax rate could do so. The effects of this problem, which has been labeled "municipal overburden," on the ability of some urban areas to meet their educational needs is now well documented. See, e. g., Robinson v. Cahill, 118 N.J.Super. 223, 273, 287 A.2d 187 (Law Div.1972). Berke, Answers to Inequity, 82-86 (1974); Grubb & Michelson, "Public School Finance in a Post-Serrano World, " 8 Harv. Civ.

Rights -- Civ. Lib.L.Rev. 550, 564-66 (1973); Note, "A Statistical Analysis of the School Finance Decisions: On Winning Battles & Losing Wars, " 81 Yale L.J. 1303, 1314-15 (1972); Coons, Clune & Sugarman, Private Wealth & Public Education 233-36 (1970). Indeed, the State Aid to School Districts Study Commission (Bateman Commission), which drafted what subsequently became the Bateman-Tanzman Act, took express note of the problem in its report. Bateman Report, supra at 9, 42-43, 55 97-99. The Bateman Commission, however, expressly chose not to deal with this problem in devising an aid formula and no provision was made for this problem in the Bateman-Tanzman Act. Bateman Report,

supra, 8-9, 42-43, 54-55, a fact that was noted in Robinson I, supra, 62 N.J. at 519, 303 A.2d 273. Recent attempts to reform school finance in New Jersey have consistently treated the problem of municipal overburden as an important defect in the present system to be remedied. See, e. g., Special Message by Governor Byrne to the Legislature, A Plan for Education and Tax Reform in New Jersey, 21-25 (June 13, 1974).

The majority concedes the significance of the municipal overburden problem but declines to deal with the impact of this problem on disparities in resources available for education in many local aschool districts because (a) many districts

suffering most from the effects of municipal overburden will receive increased aid anyway under the Court's order and (b) the problem is too complicated to be dealt with by the Court. Ante at 350-352, 339 A.2d at pp. 201-202. Neither of these asserted reasons is well-founded.

As described above, the "incentive-equalization" formula contained in N.J. S.A. 18A:58-5(b) was designed to deal with two sources of disparity among local school districts in ability to finance education: differences in local property tax bases and differences in per-pupil education costs. The third source of disparity, municipal overburden, is wholly independent of the other two problems; even if those problems were

completely solved, that of municipal overburden would remain. The "incentive-equalization" formula was not designed to deal with the problem of municipal over-burden. That some districts that suffer from municipal overburden also suffer from insufficient tax bases and high per-pupil costs and, so, benefit from increased use of the incentive equalization formula is pure happenstance.[12]

To measure with perfect accuracy the impact of municipal overburden on the ability of urban areas to provide resources for education is an admittedly formidable task, cf. Bateman Report, supra at 55 (urging further study), but there are a number of simple ways of

adequately approximating it.[13] The "incentive-equalization" formula can be adjusted to compensate in a rough way for municipal overburden without great difficulty.[14] The failure of the Court to attempt to do so simply buries the cities of New Jersey a little deeper in social and financial difficulties.

IV

I regret that I am unable to concur more fully in the majority opinion. This case, born in controversy and reared in criticism, is one of rare importance for the people of New Jersey. It would be better if we could speak with a singe voice. The relief ordered by the Court is a step forward and is welcome evidence

of proper judicial commitment to ultimate implementation of the education clause, but it is only a very small step and not nearly adequate to the circumstances. It does imcomplete justice at best.

It is the State's obligation to rectify any breach of the education clause. "If local government fails, the State government must compel it to act, and if the local government cannot carry the burden, the State must itself meet its continuing obligation." Robinson v. Cahill I, 62 N.J. at 513, 303 A.2d at 294.

That obligation is not met by unsuccessful efforts by the legislative and executive branches to devise a plan to achieve the results demanded by the

Constitution, however arduous and bona fide those efforts may have been. To the children of New Jersey it matters not at all whether the State's failure to provide the educational opportunities guaranteed by the Constitution is the consequence of a deliberate policy of intransigence or merely the by-product of deadlock within the coordinate branches of government.

It has been suggested that the Legislature cannot reasonably be expect to act while the present depressed economic conditions continue. The dimensions of constitutional rights and duties, however, do not fluctuate with the rise and fall of the stock market; nor are those obligations of the State contingent upon the passing

political expediency of raising revenues to comply. Economic claustrophobia cannot be permitted to overcome constitutional mandates. Obedience by the State to its organic charter is a perpetual duty--not one to be deferred to some more propitious future date. Government must observe the law scrupulously. It cannot be a law-breaker.

This Court may not put its imprimatur on the consequences of the existing stalemate within the Executive and Legislature. We, too, are bound by the mandates of the Constitution. It would undoubtedly be more convenient to endure consitutional violations than to take the grave steps necessary to prevent or

correct them. But if we long permit the guaranteed rights of the children of this State to be negated by governmental inaction, then we have failed to live up to our own constitutional obligations.

The Court has the power to go even farther in ordering relief than I have urged in this opinion. It has the inherent power to completely remedy the profound constitutional wrongs identified in Robinson I, supra. Delays, which are greeted with sighs of relief, are no substitute for action. We should not fear unpopularity. Any further delay or inaction is not to be tolerated. It is no longer enough for this Court to make ripples. To vindicate the rights

guaranteed by the education clause we must make great breakers, and, if need be tidal waves.

Despite the order the Court issues today, hundreds of thousands more children will be obliged to pass through inadequate school systems in this State without receiving the quality education to which they are entitled. I cannot concur in such a result.

Footnotes

1 This is, of course, only one possible definition of equality of educational opportunity. See generally McDermott & Klein, "The Cost-Quality Debate in School Finance Litigation: Do Dollars Make a Difference," 38 Law & Contemp. Prob. 415, 416-23 (1974); Wise, "Legal Challenges to Public School Finance," 82 School Rev. 1, 15-19 (1973). The use of this definition by the Court throughout this litigation should not be understood as foreclosing the possibility that other definitions may be more appropriate to other circumstances to which the education clause applies.

2 The Court accepted the finding of the trial court that as a result of the disparities among districts in resources devoted to education, the State had failed to fulfill its obligation to provide a "thorough and efficient" system of education for all pupils. Robinson I, supra, 62 N.J. at 515-16, 303 A.2d 273. The relationship between expenditures on education and the quality of education provided has been a much mooted question among educators.

See, e. g., McDermott & Klein, "The Cost-Quality Debate in School Finance Litigation: Do Dollars Make A Difference?" 38 Law & Contemp.Prob. 415 (1974); Mosteller & Moynihan, eds. On Equality of Education (1972); Buthrie, Kleindorfer, Levin & Stout, Schools & Inequality (1971); Coleman, Equality of Educational Opportunity (1966). There can hardly be any doubt, however, that adequate financing is a necessary condition for an effective educational system, even if not a sufficient one. Cf. McDermott & Klein, supra, at 429-30.

3 This determination would necessarily involve an evaluation of the cost of achieving a "thorough and efficient" standard of each district and in the State as a whole.

4 The doctrine of primary jurisdiction may demand that issues concerning the substantive educational standards required by the education clause arising in the course of this case be decided initially by the Board. Glenn View Development Corp. v. Public Service Elec. & Gas. Co., 57 N.J. 304, 271 A.2d 903 (1970); Woodside Homes, Inc. v. Morristown, 26 N.J. 529, 141 A.2d 8 (1958).

"Primary jurisdiction * * * " applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. * * * (United States v. Western Pacific R.R. Co., 352 U.S. 59, 63-64, 77 S.Ct. 161, 165, 1 L.Ed.2d 126 (1956).

This doctrine is, of course, merely one of priority of jurisdiction and operates to give the Court the benefit of the expert judgment of the Board and Commissioner. It does not relieve the Court of its ultimate responsibility to interpret and enforce the education clause. Federal Maritime Bd. v. Isbrandtsen Co., 256 U.S. 481, 78 S.Ct. 851, 2 L.Ed.2d 926 (1958); 3 Davis, Administrative Law, Section 1901 at 3-6 (1958).

5 The promulgation of statewide standards does not necessarily mean that all school systems must conform to a single rigid pattern. It does mean that the State may not permit diversity to be accompanied by a dilution in the quality of education provided.

[6] The parties have briefed and argued at considerable length the merits of "input," "output" and "process" standards. See Tractenberg, "Reforming School Finance Through State Constitutions: Robinson v. Cahill Points the Way," 27 Rutgers L.Rev. 365, 421-22, nn. 276, 277 (1974). The distinctions among these types of standards may in application be more illusory than real. Ultimately a well-conceived educational system requires that educational goals be formulated, that decisions be made as to what inputs of human and material resources are required, that the resources be properly allocated among students according to their needs in light of the goals, and finally that the success of the system in achieving its educational goals be evaluated and, based upon that evaluation, the choice of educational goals, the decision as to resource needs, and the process of allocating resources to students be revised. Cf. Levin, "A Conceptual Framework for Accountability in Education," 82 School Rev. 363 (1974). N.J. Const. (1947), Art. VIII, Section IV, Paragraph 1 does not require either "input," "output," or "process" standards in the abstract. It does require that the State adopt educational goals which

implement the constitutional requirement that the system be designed to equip each child for his role as a citizen and a competitor in the labor market and that the State adopt standards which focus upon the success of each school district in reaching those goals.

[7] It should be noted that the State has already established a statewide educational assessment program. N.J.A.C. 6:39-1.1 et seq.; see Ascher, "Educational Assessment," N.J.E.A. Journal 22 (Nov. 1972). While the adequacy of existing standardized tests to evaluate educational accomplishment is open to serious doubt, see, e. g., McDermott & Klein, supra at 424-238; cf. Larry P. v. Riles, 343 F.Supp. 1306 (N.D.Cal.1972); Note, "Legal Implications of the Use of Standardized Tests in Employment & Education," 68 Colum.L.Rev., 691 (1968); but see Berkelman v. San Francisco Unified School District, 501 F.2d 1264 (9 Cir. 1974), the establishment of a statewide assessment program is a necessary first step toward implementing standards of the type demanded by the education clause.

[8] The Board has announced its intention to promulgate regulations implementing

the education clause. Proposed Rules for Thorough and Efficient Education, 7 N.J.Reg. 132(a) et seq. (April 10, 1975). Since these regulations have not yet been promulgated in their final form it would be inappropriate to commentupon them in any detail. Before this Court, the Board and Commission have declared that their intention is to issue regulations which establish "process" standards. They define the "process" approach as "an educational system focusing on the delivery of resources to students in the most effective way, 'effective' being defined in terms of whatever works best for each individual learner." If this is indeed the thrust of the regulations to be issued, then they would not comply with the constitutional requirements.

[9] This estimate assumes that the Bateman-Tanzman Act will continue to be fully funded.

[10] The situation in this case is thus very different from the one presented in Gautreaux.v. Romney, 457 F.2d 124 (7 Cir. 1972), where the proposal that funding of wholly unobjectionable programs be enjoined so as to stimulate correction of constitutional defects in other programs was rejected.

[11] The majority fears that the grant of any affirmative relief for this school year would create chaos in the budgetary process in local school districts. It is undeniable that a grant of affirmative relief by the Court for this school year would complicate the process of approval of local school budgets this spring. That process is governed by the various provisions of N.J.S.A. 18A:22, which sets out a timetable for formulation and adotpion of these budgets. The Legislature, however, has already pushed the timetable back for this year. L.1974, c. 191. Even this revised schedule is not so tight as to preclude further compression, either by the Legislature, or in the absence of legislative action, by the Court itself. Oral arguments could be scheduled in mid-February and a decision announced shorty thereafter.

A certain amount of confusion and a great deal of dissatisfaction would undoubtedly result. The first can be ameliorated by diligence on the part of State and local officials. The second, the inevitable discordant accompaniment to possible change, should play no part in our decision.

The real question is: Can this Court,

consistently with its obligations to uphold and to enforce the Constitution, trade the constitutionally guaranteed rights of hundreds of thousands of children to an equal educational opportunity for the possibility of avoiding some difficulties in meeting local budget-making deadlines. I do not see how this question can be answered in any way but in the negative. (Robinson III, supra, 67 N.J. at 42-43, 335 A.2d at 9-10 (Pashman, J., dissenting); footnotes omitted).

12 In general large cities do not suffer from inadequate tax bases but do suffer badly from municipal overburden. Hence use of a district power equalizing formula ordinarily tends to cuase these cities to lose state aid rather than gain it. This has been one of the principle defects of the use of that approach. Berke, supra 83, 104-5; Grubb & Michelson, supra 564-66. That major New Jersey cities benefit from use of a power equalizing formula is a measure of the desperate condition of our cities, for it indicates that they suffer from low property values as well as municipal overburden. Jersey City (553), Paterson (560), Hoboken (562), Trenton (566), Newark (572) and Camden (575) all rank among the 30

lowest of the 578 operating school districts in equalized valuation per weighted pupil.

13 Usable measures of the relative degree of municipal overburden include (1) the ratio of local revenues per capita used for non-school expenses to the statewide average of local revenues per capita used for non-school expenditures, Grubb & Michelson, supra at 565 & n. 39; (2) the ratio of the percentage of local revenues used for school purposes to the statewide average percentage of local revenues used for school purposes, id.; and (3) ratio of the local non-school tax rate to the statewide average local non-school tax rate. See Bateman Report, supra at 97.

14 With suitable restrictions and adjustments any of the measures described in the previous footnote can be used to modify the value for the local property tax base used in the "incentive-equalization" formula so as to reflect the fact that in some districts much of the ostensible property tax base is unavailable for education purposes because of disproportionate non-educational demands upon it. In other words, rather than the formula providing that the State will grant aid equal to that which would be raised by applying the

local tax rate to the difference between the guaranteed valuation and the local property tax base, the formula would provide that the State would grant aid equal to that which would be raised by applying the local tax rate to the difference between the guaranteed valuation and a figure more truly representative of the portion of the local property tax base which is actually available for educational purposes.

Thus, for example, the equalized valuation might be replaced in the "incentive-equalization" formula by the equalized valuation multiplied by the ratio of the percentage of local revenues used for school purposes to the statewide average percentage of local revenues used for school purposes (a measure of relative municipal overburden). See, e. g., Bateman Report, supra at 97-98; Grubb & Michelson, supra at 562-63; Mich.Comp.Laws Ann. Section 388.1279 et seq. discussed in Grubb, "The First Round of Legislative Reforms in the Post-Serrano World," 38 Law & Contemp. Prob. 459, 484 (1974).

MOUNTAIN and CLIFFORD, JJ. (dissenting).

Today's decision marks the Court's entrance into the business of financing public education. There seems to be at least tacit agreement among us all that by reason of both constitutional law and the complexities of the subject matter, the judiciary is conspicuously unsuited for shouldering the burdens of that business, more appropriately left to the Legislature as unmistakably provided by the 1875 amendment to the 1844 Constitution, Article IV, Section VII, Paragraph 6, carried over to the 1947 Constitution in Article VIII, Section IV, Paragraph 1. Since the most meticulous search of our Constitution fails to disclose any textual

warrant for the unprecedented step taken by the majority, justification for this acknowledged judicial encroachment on the legislative preserve must be sought elsewhere. And so the majority discovers "a legislative transgression of 'right guaranteed to a citizen,'" ante at 347, 339 A.2d at p. 200, in turn evoking a judicial "response to a constitutional mandate," ante at 354. 339 A.2d at p. 204 presumably the "mandate" of Article VIII, Section IV, Paragraph 1 referred to above, directed solely to the legislative branch, since no other mandate is or possibly could be identified. By such diaphanous threat hands the justification -- indeed, the asserted necessity -- for the Court's action.

Because we find ourselves in substantial accord with many of the majority's views, and because we recognize the desirability of as much unanimity as may be mustered in support of so significant a decision as todays, it is with some reluctance that we register our dissent. Few cases receive the exhaustive treatment, both by way of opportunity afforded any interested party to present his views and by way of frequent exchange of ideas among members of the Court, as has been accorded this one. The opinions of our colleagues are entitled to and do receive our profound respect. But so firm is our conviction concerning the proper scope of the judicial function at this juncture that we feel obliged to express our

disagreement with the remedy here invoked. That disagreement focuses on the majority's conclusion that school aid funds appropriated or to be appropriated by the Legislature should be reapportioned by this Court in a manner which will allegedly attain a closer approximation of the kind of funding believed to be required to support "a thorough and efficient" education. We think the Court should rather stay its hand.

Initially it should be emphasized that in wrestling with this difficult problem it is of the utmost importance to bear in mind that as of this moment no one has defined what is meant by "a thorough and efficient" education. As the majority

correctly points out, it is not the function of this Court to establish the components of a thorough and efficient education. It is rather its duty to "appraise (the) compliance" of an educational system presented for judicial review as to constitutional sufficiency. We note with approval, as does the majority, that the State Commissioner of Education has prepared and published rules and regulations looking to this end. 7 N.J.Reg. 132 (April 1975). We are likewise aware that in each house of the Legislature bills have been introduced bearing directly upon the same subject matter.

In our view there has clearly been delegated to the Commissioner of Education

the power, as there has also been allocated to him the responsibility, to take whatever steps may be necessary to define the meaning of the constitutional term "thorough and efficient," to lay down guidelines for the implementation of a program that will give it reality, and to see to it that the school districts of the State actually meet these requirements. Bd. of Educ. of Twp. of E. Brunswick v. Twp. Counsil of E. Brunswick, 48 N.J. 94, 223 A.2d 481 (1966); Bd. of Educ. of Elizabeth v. City Council of Elizabeth, 55 N.J. 501, 262 A.2d 881 (1970); Jenkins v. Twp. of Morris School Dist., 58 N.J. 483, 279 A.2d 619 (1971). A clear if unstated effect, of our earlier opinion in this case,

Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973); was to lay upon the Commissioner an immediate obligation to formulate rules designed to make precise the nature of the constitutional mandate and to provide for its implementation.

While we think it clear that as the law now stands the Commissioner of Education has both the power and the obligation to define what is meant by "a thorough and efficient" education and to see that our public school system meets prescribed standards, we are very conscious that in exercising such functions he is acting more or less as an agent of the Legislature. The latter is at any time completely at liberty to change or revoke his powers or to supersede them by the

passage of legislation immediately directed to the issue. Some of the bills that have been introduced seem to have a close textual correlation with the Commissioner's proposed rules, suggesting that there is here a commendable cooperative effort being made by the two political branches of government.

Thus far we are in general agreement with the majority. When, however, it comes to the proposed reallocation of appropriated funds, as we have said, we take a different view. The problem rests in the concept commonly referred to as the doctrine of the separation of powers. It finds explicit expression in the New Jersey Constituion:

> The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or consituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.
>
> (Art. III, Paragraph 1.)

The doctrine has not enjoyed a consistent development; it has been praised and it has been criticized. The uneven history of the concept may be noted but need not detain us here. The Supreme Court of the United States once said that all powers of government are divided into the executive, the legislative, and the judicial; and that it is "essential to the successful working of this system, that the persons entrusted with power in any

one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation to be limited to the exercise of the powers appropriate to its own department and no other." Kilbourn v. Thompson, 103 U.S. 168, 191, 26 L.Ed. 377, 387 (1881). Professor Kenneth Culp Davis believes that probably no more extreme statement of the theory of separation of powers can be found in Supreme Court opinions. I Davis, Administrative Law Treatise, §1.09, at 64 (1958). Some years later, although in dissent, Justice Holmes suggested a somewhat different and rather more modern view:

> It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into water tight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires.
>
> (Springer v. Government of Philippine Islands, 277 U.S. 189, 211, 48 S.Ct. 480, 72 L.Ed. 845, 853 (1928).)

The most significant challenge to the doctrine of the separation of powers came with the birth and lusty growth of administrative law. The story has been often told and needs no repeating. In modern times Congress and state legislatures have created regulatory agencies that have quite generally possessed legislative, judicial and executive powers. Thirty or forty years ago administrative agencies

were attacked as being flagrant examples of a violation of the doctrine of the separation of powers, but the positive needs of government supported by flexible constitutional interpretation won the day. Landis, The Administrative Process 1-5 (1938); 1 Davis, supra, §1.09; 1 Cooper, State Administrative Law 15 et seq. (1965).

Clearly today the doctrine of the separation of powers cannot be said to require a complete compartmentalization along triadic lines. More and more courts have come to recognize that where a practical necessity exists, a blending of powers will be countenanced, but only so long as checks and balances are present to guard against abuses. This was the

view adopted by this Court in Mulhearn v. Federal Shipbuilding & Dry Dock Co., 2 N.J. 356, 362-65, 66 A.2d 726 (1949).[1]

As this Court more recently observed:

> The doctrine of separation of powers must * * * be viewed not as an end in itself, but as a general principle intended to be applied so as to maintain the balance between the three branches of government, preserve their respective independence and integrity, and prevent the concentration of unchecked power in the hands of any one branch.
>
> (David v. Vesta Co., 45 N.J. 301, 326, 212 A.2d 345, 358 (1965) (Emphasis in original).)

Professor Davis is also of the view that

> * * * the true principle that should guide the allocation of power within the general framework is not the principal of separation of the three kinds of power but is the principle of check.
>
> The danger is not blended power. The danger is unchecked power.

(1 Davis, supra, §1.09, at 68.)

Two examples may help to illustrate the point we make. It would probably be generally conceded that when the Legislature bestows judicial and executive powers upon an agency of its creation, there is a departure from the doctrine of the separation of powers, at least as seen in its most simplistic and restricted sense. So too, when judges make law in the process of deciding cases, it can properly be said that they are indulging in legislation and that this is theoretically repugnant to the doctrine of the separation of powers. Each of these practices, however, is now completely accepted and has indeed become commonplace. Signifi-

cantly, however, in each of these instances the power being exerted by the branch of government to which that power is not intrinsically inherent is not unchecked. In the first example given, it will be noted that the various powers bestowed upon a judicial agency are all subject to judicial review. In the second example the judicial legislation undertaken by a court in the exercise of its adjudicatory function is immediately subject to the will of the legislature. The latter has the last word; by appropriate legislation the rule of law laid down by the court can be at once changed or annulled.

But what of the power that we are considering here? We assume it would not

be disputed that the power of appropriating public funds is commonly understood to be a legislative function. If the Court undertakes to reallocate funds the ultimate disposition of which has been fixed by the Legislature pursuant to the exercise of its acknowledged power of appropriation, how is this new-found power of the Court to be controlled? How can it be checked? We discern no way that this can be done. The power to appropriate is singularly and peculiarly the province of the Legislature. It is commonly thought of as an adjunct to the taxing power. If the courts are at liberty, for whatever reason, to reallocate appropriated funds in some particular

case, why may not the courts do so in other cases as well? Who is to stay the judicial hand and what law is to guide its exercise? There are no discernible boundaries or limits beyond which the power might not be exerted provided only that the Court were made to feel that the exigency of the moment was sufficiently serious to justify the action. It seems to us that the exercise of such a power by the courts is indeed unchecked, and that it cannot be said to fall within any relaxation of the doctrine of the separation of powers that has thus far been countenanced. See generally Gibbons, "The Interdependence of Legitimacy: An Introduction to the Meaning of Separation of Powers," 5 Seton Hall L.

Rev. 435 (1974); Wright, "The Role of the Supreme Court In A Democratic Society--Judicial Activism or Restraint?," 54 Cornell L. Rev. 1 (1968).

Quite apart from these compelling doctrinal considerations which work against the majority's remedy, we would point out that the federal decisions relied upon to support the existence (much less the exercise) of the judicial power to redistribute and de facto appropriate funds, ante at 352, 339 A.2d at p. 203, are not in point. The separation of powers is an intra-governmental concept, not an inter-governmental one. It refers to the allocation of power within a particular sovereignty or government, whether

state or federal. Cf. Baker v. Carr, 369 U.S. 186, 210, 82 S.Ct. 691, 706, 7 L. Ed. 2d 663, 681-82 (1962). But the federal cases cited in the majority opinion all concern evaluations of the deeds or practices of another governmental entity not on the same level with the federal judiciary, i.e., a state or subdivision thereof.[2] In not one case cited by the majority did affirmative conduct or idleness of a coordinate, co-equal branch confront the federal courts. The restraint normally imposed on the exercise of judicial power by the separation of powers doctrine is thus lacking in those instances. The sole decision mentioned by the majority

involving this Court and a co-ordinate branch of government, Jackman v. Bodine, 43 N.J. 453, 205 A.2d 713 (1964), simply reiterates the "one-man, one-vote" principle etched into the law by the Supreme Court in Baker v. Carr, supra, and Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed. 2d 506 (1964). Measuring the consistency of state activity against the command of the federal Constitution does not raise the spectre of the separation of powers. Nor were what Mr. Justice Stewart has characterized as the "intractable economic, social, and even philosophical problems" of a remedy, Dandridge v. Williams, 397 U.S. 471, 487, 90 S.Ct. 1153, 1163, 25 L.Ed.

2d 491, 503 (1970), so intense in Jackman as the problems generated by this Court's act of reallocating funds in the case at bar. And if the cited authorities represent what the majority characterizes as "emerging modern concepts as to judicial responsibility to enforce constitutional right," ante at 352, 339 A.2d at p. 203, we suggest those concepts should for now be permitted to remain in their "emerging" stage rather than receive further nourishment from imprudent and untimely judicial activism.

Moreover, as the majority opinion points out, there is a second provision of the New Jersey Constitution which is also applicable. Article VIII, §11, ¶2, in pertinent part reads as follows:

> No money shall be drawn from the State treasury but for appropriations made by law. All moneys for the support of the State government and for all other State purposes as far as can be ascertained or reasonably foreseen, shall be provided for in one general appropriation law covering one and the same fiscal year; * * *.

Again, we face a specific and explicit constitutional prohibition standing in the way of the action sought to be undertaken.

We recognize that it is difficult to deal in terms of constitutional absolutes. Constitutional interpretation is a delicate, sensitive and flexible process. Yet we cannot at the present time foresee a state of affairs or set of circumstances which would justify

this proposed encroachment upon the prerogative of another branch of government.

Other reasons as well suggest that the Court should exercise self-restraint. Since this Court's decision several years ago there has been no lack of energetic and thoughtful attention given to the problem we are considering. It has been the almost constant concern and preoccupation of the Legislature and of the Commissioner of Education. While these considerable efforts have thus far been unsuccessful, we should nevertheless await their fruition. At the very least the step here contemplated should not be taken before anyone yet knows what

is meant by "a thorough and efficient" education. The elusive concept has many ingredients of which fiscal considerations are but one. No one knows today which school districts in the State may or may not be fully meeting their constitutional obligations. This point is made clear in the thoughtful and penetrating editorial entitled "Courts cannot Encroach upon the Powers Belonging to the Executive or Legislative Branches of Government" appearing in the New Jersey Law Journal on April 24, 1975. (98 N.J.L.J. 356). Surely, all constitutional restraints aside, as to any particular school district, there should first be a determination of legitimate fiscal insufficiency before supplying

a judicially granted increase in state aid beyond the amount set by the Legislature, just as there should be a finding of overabundance of funds before invoking a judicially-mandated decrease.

Finally, we ackrowledge, that our position of restraint may very well be at odds with what may be seen as the most expeditious and efficient method of achieving final resolution of this troublesome case: exercise of the Court's presumed power itself to undertake, as the majority does today, the necessary financing. But restraint derived from a perceived limitation on the judicial power at this moment does maintain some semblance of a working balance between

our three branches of government. Mr. Justice Brandeis once observed:

> The doctrine of the separation of powers was adopted * * * not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.
>
> (Myers v. United States, 272 U.S. 52, 293, 47 S.Ct. 21, 85, 71 L.Ed. 160, 242-43 (1926) (dissenting opinion).)

This doctrine deserves more than the ceremonial bow given it by the majority en route to its discovery of the requisite authority to act. This power it draws not from the Constitution but from a conviction that since it must act, it must therefore also have the

power to act. The present circumstances do not yet compel us to find that we must, out of sheer necessity, have that power. While ours is an imperfect resolution, it better preserves for the future the integrity of the institutions of this government.

Footnotes

1. In the course of his opinion for the Court, Chief Justice Vanderbilt had this to say:

> The doctrine (separation of powers) * * * has not only been accepted as a cardinal principle of American constitutional law but has been relied upon from our earliest days as a nation as a fundamental and indispensable bulwark against despotism. * * * Lard Acton's aphorism merits quotation at this point: "Power tends to corrupt and absolute power corrupts absolutely." Acton: Essays on Freedom and Power (1948). The doctrine of the separation of powers is the great contribution of Anglo-American Lawyers to the prevention of absolutism and the preservation of the rights of the individual against the state. (2 N.J. at 363-64, 66 A.2d at 730.)

2. The Court's reliance on Mills v. Bd. of Educ., 348 F.Supp. 866 (D.D.C. 1972) is misplaced. In Mills the District Court found a violation of equal protection in the school district's failure to provide an education for mentally handicapped children. The Board of Education asserted that no funds had

been appropriated by Congress for that purpose. We suggest that the Court was not persuaded by that contention because it was obvious that Congress intended no such restricted use of the appropriated funds and the Board was simply misinterpreting the appropriation law. However, even assuming the majority's interpretation of Mills is correct, we take notice of the fact the defendants there were not the executive and legislative branches of the federal government, but rather the Board of Education and the Commissioner of the District of Columbia. And they were directed merely to redistribute the funds made available to them.

KENNETH ROBINSON, an infant by his parent and guardian ad litem, ERNESTINE ROBINSON, et als.,

Plaintiffs-Respondents,

-vs-

WILLIAM T. CAHILL, Governor of the State of New Jersey, et als.,

Defendants-Appellants.

ORDER

On April 3, 1973, this court filed its opinion (62 N.J. 473) in the above captioned cause (which constituted its judgment, R. 2:11-3(b)) modifying the judgment of the Superior Court, Law Division, Hudson County and affirming said judgment as so modified. Said opinion generally held that the present system of maintaining and supporting

public elementary and secondary school education in this state is unconstitutional because it does not conform to the state's obligation imposed by Art. VIII, §4, par. 1 of the New Jersey Constitution. The court reserved decision on the subject of remedies and sought the further views of the parties. After receiving the same, it filed a further opinion on June 19, 1973 (63 N.J. 196), concluding as follows:

> * * *It is our view that the Court should not disturb the statutory scheme unless the Legislature fails to enact, by December 31, 1974, legislation compatible with our decision in this case and effective no later than July 1, 1975. We withhold ruling upon the question whether, if such legislation is not so adopted, the Court may order the distribution of appropriated moneys toward a constitutional objective

notwithstanding the legislative directions.

> We retain jurisdiction. Any party may move for appropriate relief, before or after December 31, 1974, if new circumstances so warrant.

No such legislation was enacted by December 31, 1974, although efforts to that end continued through said date. The matter therefore now returns to this Court for the ordering of appropriate remedies to effectuate the court's original decision.

The above numbered motions have been filed with sundry objects. Some seek injunctions with respect to, and/or redistribution of, some or all of such funds as may be appropriated by the Legislature as various forms of state

aid to local school districts for the school year commencing July 1, 1975 (none have yet been appropriated); others seek leave to intervene or to participate as amici curiae to present their views thereon and still others seek action on miscellaneous matters.

Upon consideration of all said motions and the briefs and accompanying documents, it is on this 23 day of January, 1975, DETERMINED AND ORDERED as follows:

1. The motion of the defendants The President of New Jersey Senate and the New Jersey Senate for a rehearing of the case (M-475) is denied. The motion of defendants Speaker of the General Assembly and the General Assembly (M-521)

for order in aid of judgment is denied.

2. The motions of petitioners Christiansen, et als. "for an extention of time of thirty (30) days to allow petitioners to intervene and to file a petition for reharing" (M-453 and 454) are denied.

3. All school districts must, even under recent legislation extending timetable dates, commence within a very few days the process of adopting budgets for the school year 1975-76, arraning for elections and attending to other matters relevant thereto and must be advised prior thereto of the amount of state aid funds of various categories estimated to be received during said school year. Any injunction against the distribution of

said funds, or part thereof, and/or any redistribution of the same, on a different basis than now prescribed by law, while benefitting the local property tax situation in some municipalities, would in the case of many others radically increase the amount to be raised by local taxation or require substantial reduction of the educational program. The fact that there will be no legislation compatible with the Court's decision became certain only a very short time ago and the court considers it would be inequitable and, indeed, chaotic as to many school districts to effect financial changes for the 1975-76 school year at this late date and on such short notice.

Therefore, the court will order no changes in the present statutory scheme for the school year 1975-76 and defendant Commissioner of Education may immediately advise all school districts of the amount of estimated state aid funds for said year based on present law.

4. Consequently, plaintiffs' motion for relief (M-448), alternate motion for relief (M-449) and second alternate motion for relief (M-450) are denied and motion of defendant Governor Brendan T. Byrne (successor to defendant William T. Cahill) for order in aid of judgment (M-452) is denied. No further motions for relief need be filed by any party. Plaintiffs' motion for discovery (M-451)

is denied without prejudice to renewal if the subject matter becomes relevant at a later date.

5. The court will hear oral argument on March 18, 1975 at 10:00 A.M. on the following subjects as related to relief with respect to the school year commencing July 1, 1976 and years thereafter:

a. The method of determination of the definition of "a thorough and efficient system of free public schools," of the translation of that definition into financial terms and of the application thereof (including whether such definition should be administratively applied to each school district separately, to groups of districts

based on particular characteristics or equally to all).

b. The extent of the power of the court to order relief from, or changes in, the present statutory financing scheme on a temporary or permanent basis in order to assure the meeting of the state's obligation to implement such system as defined.

c. To what extent and in what particular ways the court should exercise such power.

d. Whether the court should appoint a special master, to hear the views of the parties, including especially those of defendant Commissioner of Education and defendant State Board of Education,

and the amici curiae and receive from the parties any evidence deemed relevant, and to make recommendations to the court as to said definition and its application, the power of the court, and its exercise, in order that a final determination as to remedies may be made by the court in sufficient time that every school district may know by October 1, 1975 what the state aid situation will be as to it, as far as practicable, for the school year 1976-77.

6. In order that said oral argument may be of manageable proportions in view of the large number of parties and movants for intervention or participation

as amici curiae, the court will hear oral argument only on behalf of the following:

a. the named parties, i.e., the plaintiffs by one attorney; the Governor pro se or by his attorney; the President of the Senate and the Senate by one attorney; the Speaker of the General Assembly and the General Assembly by one attorney; the Attorney General for the Commissioner of Education, the Department of Education and the State Board of Education;

b. those amici curiae who have previously participated in oral argument herein who may wish to be heard and so advise the Clerk;

c. The following present petitioners who are hereby granted permission to participate as amici curiae:

(1) New Jersey School Boards Association, by one attorney (M-463);

(2) New Jersey Education Association, et als., by one attorney (M-476);

(3) The following school districts or municipalities claiming to be substantially injured by any redistribution of state aid funds: Township of Livingston (M-470); Montclair, Berkeley Heights, Chatham Township, New Providence, Rumson, Sandyston-Walpack and Summit (M-474); Millburn (M-498); Avon-by-the-Sea and Belmar (M-499); Englewood and the City of Englewood (M-511); Morris School District (M-512); Lyndhurst (M-514); Mendham Township (M-522), and Mayor

of the Borough of Carlstadt (M-523), by one attorney to be selected by the attorneys for said districts (in the absence of such agreement, there will be no oral argument on behalf of such districts).

7. All the persons, organizations and entities named in paragraph 6 hereof may, if desired, file and serve on all other parties and amici curiae briefs additional to those already on file by February 24, but limited to the subjects set forth in paragraph 5 hereof. Any briefs in reply thereto shall be filed and similarly served by March 3.

8. Any member or members of the Senate or General Assembly in disagreement with the position taken by counsel for those bodies may, pro se or through

attorney, file and serve upon the same persons and by the same date, briefs and statements of his, her or their views upon the same subjects, all in accordance with paragraph 7 hereof. The motions of petitioners Russo, et als (M-513) and Greenberg, et als (M-515) are granted to such extent.

9. The motions of the following, to the extent only of the allowance of participation as amici curiae, are granted, limited to the filing of briefs on the same basis as set forth in paragraph 7 hereof: City of Newark (M-432); Pleasantville Taxpayers Association, et als (M-469); New Jersey Education Reform Project of the Greater Newark

Urban Coalition (M-471).

10. All motions to intervene as a party or otherwise participate are denied except to the extent hereinbefore set forth.

11. No further applications for intervention or participation will be considered.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 23rd day of January, 1975.

s/ FLORENCE R. PESKOE
Clerk

Justice Pashman disagrees with certain portions of the decretal part of the above order and is filing a memorandum stating his views.

Supreme Court, U. S.
FILED
SEP 10 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

DOCKET NO. 75-291

HERBERT C. KLEIN,

Petitioner,

vs.

KENNETH ROBINSON, an infant by his parent and Guardian ad Litem, ERNESTINE ROBINSON and ERNESTINE ROBINSON, individually; PAUL JORDAN, LAWRENCE KRAMER, and WILLIAM S. HART, individually and as Mayors respectively of Jersey City, Paterson, Plainfield and East Orange; THE CITIES OF JERSEY CITY, PATERSON, PLAINFIELD and EAST ORANGE; THE BOARDS OF EDUCATION OF THE SCHOOL DISTRICTS OF JERSEY CITY, PATERSON, PLAINFIELD and EAST ORANGE; THE BOARD OF SCHOOL ESTIMATE OF JERSEY CITY; and RICHARD F. McCARTHY; all individually and as representatives of a class or classes,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Roscoe L. West, Elementary Education in New Jersey: A History, D. Van Nostrand Co., Inc. (Princeton 1964) pp. 42-45 8

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

DOCKET NO.

WILLIAM K. DICKEY, ALFRED N. BEADLESTON
and THOMAS H. KEAN,

Petitioners,

vs.

KENNETH ROBINSON and
WILLIAM T. CAHILL, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

The Respondents Kenneth Robinson et al. as the plaintiffs in the cause which the Petition seeks to review, file the instant brief in opposition to the petition for a writ of certiorari to review the judgment of the New Jersey Supreme Court.

OPINIONS BELOW

The opinion of the New Jersey Superior Court is reported at 118 N.J. Super. 223, 287 A.2d 187: supplemental opinion of the New Jersey Superior Court is reported at 119 N.J. Super. 40, 289 A.2d 569; the opinion of the New Jersey Supreme Court is reported at 62 N.J. 473, 303 A.2d 273; supplemental opinion of the New Jersey Supreme Court is reported at 63 N.J. 196, 306 A.2d 65, *cert. den sub nom Dickey v. Robinson* — U.S. —; 67 N.J. 333 (October Term 1972). Said opinions are appended to petitioners brief as appendices A, B, C and D, respectively.

JURISDICTION

The judgment sought to be reviewed is dated and was entered on May 23, 1975.

The jurisdiction of this court is invoked under 28 U.S.C.A. §1257(3) which provides for review of decisions in which state statutes are held violative of the United States Constitution but is clearly not applied herein. The Petitioner lack standing, he is not a party to the action merely an amicus.

The Petition on its face does not state a substantial Federal question and is a sham.

The initial opinion of the New Jersey Supreme Court constitutes its judgment, *N.J. Court Rules* 2:11-3(b). In its opinion filed April 3, 1973, the New Jersey Supreme Court directed further argument on remedies. The court entered its further opinion on June 19, 1973. The time within which to appeal a petition for *certiorari* runs from the date of the April 3, 1973 judgment, *Department of Banking v. Pink*, 317 U.S. 264, 268.

The alleged order under appeal is merely interlocutory.

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[1] *New Jersey Court Rules* 2:11-6(a) provide that a petition for rehearing must be made within ten days after entry of judgment.

QUESTIONS PRESENTED

1. Does this court have jurisdiction to enforce and interpret the New Jersey Constitution by reviewing decision of the New Jersey Supreme Court based solely on State grounds under the guise of the guarantee of a Republican form of government mandated by Article IV, Sec. 4 of the U.S. Constitution?

2. Does the decision of the New Jersey Supreme Court by interpreting the State Constitution so violate the doctrine of the separation of powers as to deprive the people of New Jersey of a Republican form of government and compel Federal intervention?

3. Does the decision of the New Jersey Supreme Court violate the doctrine of the separation of powers by exercising the time honored power of judicial review?

COUNTER-STATEMENT OF CASE

On February 13, 1970 a complaint was filed in the Superior Court of New Jersey under the name *Kenneth Robinson et al. v. William T. Cahill et al.* The suit sought alternatively declaratory relief and injunctive relief presenting several complex questions which can be simplistically stated as:

Does the present system of financing and providing education violate provisions of the United States and/or the New Jersey Constitution.

That suit passed through three amended complaints as well as a pre-trial, on March 12, 1971, and was reached for trial without a jury on November 1, 1971.

To facilitate the trial both parties moved for summary judgment and agreed that all affidavits filed would be treated as evidence and defendant was deemed to have admitted all facts that their evidence did not specifically contradict, but did not admit any of the opinions set forth in the affidavits to be true, *albeit* the Court could consider and accept those opinions. The Attorney General filed no affidavits. After a trial which consumed several days, final argument in the matter was set for, and held, on December 10, 1971. Supplemental material was requested by the Court and supplied by counsel. On January 19, 1972 an opinion of the court, finding for the plaintiffs was rendered. An order for judgment was submitted to the Attorney General but objections were made and plaintiffs moved to settle the terms of the judgment, that motion was returnable on February 4, 1972. At that time, after hearing the argument of counsel, the court entered its final judgment.

The judgment included a declaratory judgment for the plaintiffs, an injunctive order effective January 1, 1973

and a directive that the Commissioner of Education file a certain plan with the Court by November 15, 1972. These later provisions were contingent upon legislative inaction in the field.

Thereafter plaintiffs moved in the Supreme Court of New Jersey for certification and to shorten the time for appeal to avoid delay of a hearing in the Appellate Division. During the pendency of that motion, the Attorney General filed his Notice of Appeal on February 25, 1972. The motion for certification was thereafter granted.

An oral application was made on February 4, 1972 by the Attorney General for an alteration in the time schedule in the judgment and for a clarification of the opinion of the trial court. That application was denied on February 4, 1972 without prejudice to the Attorney General submitting further evidence. On March 30, 1972 the trial court, after extracting the Attorney General's position, reaffirmed the denial of the application for an extension in the time schedule set forth in the main opinion and filed an opinion in connection with that denial.

On April 3, 1973 the Supreme Court of New Jersey decided the instant case of *Robinson v. Cahill,* 118 N.J. Super. 223 (Law Div. 1972); 119 N.J. Super. 40 (Law Div. 1972); *aff'd* – N.J. – (1973). In the opinion of Chief Justice Weintraub writing for the court, the court expressed the desire for further views of the parties as to: the content of the judgment including argument as to whether the judiciary may, as the trial court did with respect to the minimum aid and save harmless provisions of the so-called Bateman Act, 118 N.J. Super. at 280-281, order that monies appropriated by the Legislature to implement said act shall be distributed "upon terms other than the legislative ones." On June 19, 1973 the Court determined no further action would be taken at this time. In October 1973 this Court denied certiorari and on May 23, 1975 the New Jersey Supreme Court directed supplemental relief see 67 N.J. 333 (1975).

FEDERAL QUESTION

There is simply no Federal question involved.

The imagined federal question for which review is sought in this court involves Article IV, Sec. 4 of the U.S. Constitution. This section was not referred to in the pleadings nor was its applicability litigated in the state courts. The petitioners argue that New Jersey Supreme Court decision interfered with the prerogatives given the Legislature under Article VIII, Sec. 4, Par. 1 of the New Jersey Constitution. Such an argument is absurd. The court simply declared a statute unconstitutional as violative of the State Constitution and has acted to reallocate funds to enforce its judgment. The petitioners argue that the decision by the New Jersey Supreme Court constitutes states action which deprives the people of New Jersey of a Republican form of government guaranteed them by the Federal Constitution. These arguments would of course apply to every declaratory judgment. Thus petitioners in essence argue that the United States Supreme Court must under the Republican form of Government clause review any state Court decision holding a State Statute unconstitutional on State grounds. Such an argument is not only absurd but would violate the fundamental relationship between the States and the Federal Government.

Under such circumstances, this court lacks jurisdiction, *Whitney v. California,* 274 U.S. 337; *Thomas v. Iowa,* 209 U.S. 258; *Cf. Adler v. Board of Education,* 342 U.S. 485, 496.

ARGUMENT

POINT I

In New Jersey the most logical point of origin to discuss any educational issue is Article VIII, Sec. IV, Par. 1 which provides in pertinent part:

> "the legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of 5 and 18 years."

This provision was first adopted in 1875 as an amendment to the 1844 Constitution. At that time New Jersey had recently enacted the Free School Law L. 1871, c. 527 and to secure the right to education in more permanent form the amendment was passed Cf. Roscoe L. West, *Elementary Education in New Jersey: A History*, D. Van Nostrand Co., Inc. (Princeton 1964) at pp. 42-45. At that time education was funded almost exclusively by a uniform tax on all real property leaving local districts to add on if required. The State Superintendent Apgar said of the concept of this system of school finance, "The principal support will come from the State, and if any sum is needed to be voted by the township, it will be small. . . ." Annual report of State Superintendent of Education 1871 at p. 12.

Thereafter the relevant history was concisely set forth by the trial court: "The 1871 School Law raised significantly the proportion of school costs borne by the State. In 1870, for example, township and district school taxes ($1.45 million) and tuition ($72,000) constituted 90% of the total statewide expenditures ($1.66 million) and the State appropriation was only $100,000. *Annual School Report, 1870*, at p. 11. Thereafter, from 1872 through 1880, State funding averaged 75% of all school costs, exclusive

of construction and repairs. Local revenues constituted 23% of current expenses and 40% of all expenditures inclusive of construction and repair of schools. In fact, during these years many townships and districts raised no school taxes at all. In 1872, for example, 188 of 230 townships and 887 of 1378 districts raised no school tax. *N.J. School Report, 1872*, at p. 8.

The State continued for many years to pay a large portion of all school costs, although in 1881 it enacted a law ordering 90% of State school taxes returned to the county of origin, leaving only 10% to be distributed by the State Board equitably. L. 1881, c. 106. However, even under the 1881 law, monies returned to the counties were apportioned to all school districts in accordance with pupil census, so that equalization was achieved at least among pupils of each county. As late as 1910, for example, the State share of current expenses was approximately 67% and was almost equal to the total cost of teachers' salaries. *N.J. School Report, 1910*, at p. xv, xvi (Da429 to Da430).

This history is of some merit in understanding the context in which the Constitution of 1884 was amended. Obviously, neither Plaintiffs nor the State Court argued that the history of the 1857 enactment is controlling, for in 1947 the clause was reenacted in the new Constitution and the intent of the new delegates may not have been that public education had to be fully funded by the State out of general revenues. A proposal to include language to clearly attain that end was not adopted, *albeit* the reasons it was not acted on or the intent of the delegates is not clear. "Recommendation of the New Jersey State Federation of Labor," V Proceedings of the Constitutional Convention of 1947, State of New Jersey, Appendix, at p. 893.

It should be obvious that the clause must have had some meaning.

Prior to the initial Amendment each municipality would determine the existence *vel non* of educational opportunities. For example, it was in September of 1682 the Assembly of West Jersey ceded an isle in the Delaware River to aid the maintenance of a public school of the town of Burlington, *Cf.* Grants and Concessions of New Jersey p. 455. Eleven years later the first tax for the support of public schools was passed within the province of East Jersey, *Cf.* Grants and Concessions of New Jersey, pp. 328, 358. Throughout these early years it was municipal government which operated the schools *Cf. Riccio v. Hoboken,* 69 N.J.L. 104, 106-107 (Sup. Ct. 1903), 69 N.J.L. 649 (Err. & App. 1903).

There can be little doubt that the constitutional amendment of 1875 was designed to have some impact. Yet our present experience indicates it did not. There is still a system of local support and maintenance of free public schools with occasional state aid. A system which has remained unchanged since public education began in this state. The Constitutionality of this means of financing of education has remained unchallenged until the instant case.

In 1894, an attack on the inequality of educational facilities in the state was launched. Justice Dixon delivered the opinion of the Supreme Court in *Landis v. School District No. 44,* 57 N.J.L. 509 (Sup. Ct. 1895). *Landis* presented on a Writ of Certiorari a tax of 1893 in School District No. 44 of Cumberland County. The moving party urged *inter alia* that the power of each school district to determine what amount beyond the state appropriation should be raised by tax resulted in unequal educational opportunities and *ergo* was unconstitutional as local or special legislation. An argument not dissimilar to that to be made in *Brown v. Board of Education,* 347 U.S. 483 (1954). *Landis,* dealt with the constitutionality

anon of taxation by school districts to give education "beyond" that provided by the State, as opposed to the failure of the State to guarantee the "right to equal educational opportunities." Nonetheless, *Landis* recognized three key legal issues which are essential to understanding the equality of educational opportunity. First—*Landis* rejected the theory that the legislature is obligated to assure the same facilities are available to every child in the State. Such an affirmative guarantee of identical *facilities* may well be an unconstitutional guarantee as we shall see later. Second—*Landis* recognized that the purpose of the constitutional amendment was "to impose on the legislature a duty of providing for a thorough and efficient system of free schools. . . ." Third—*Landis* established that the schools mandated by the constitution to be provided by the legislature had to meet a standard, to wit "affording to every child such instruction as is necessary to fit it for the ordinary duties of citizenship," at 512.

This was the clause upon which the State Court decision rests. Clearly this ground is sufficient without any reference to any Federal issue to sustain the decisions of the Supreme Court of the United States. While New Jersey's Constitution has provisions comparable to the Equal Protection Clause of the United States Constitution, the State Court declined to rely upon them.

The New Jersey Constitution, Article I, Section I provides that "all persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness." As early as 1913 in *Smith v. Board of Examiners of Feeble Minded,* N.J. 35:46 (1913), Article I, Section I was recognized as a provision similar to the equal protection clause of the United States Constitution. In 1949 in

Washington National Insurance Company v. Board of Review of New Jersey Unemployment Compensation Commission, 1 N.J. 545, the initial indication of Article I, Section I, as forbidding legislation arbitrarily discriminating against some and favoring others in like circumstances was clearly set forth. There the Supreme Court recognized that there are different spheres of protection between the two provisions, but that essential to both, was the "concept of equality."

So too the New Jersey Constitution in Article I, Section V provides "no person shall be denied the enjoyment of any civil or military right or be discriminated against in the exercise of any civil or military right or be segregated in the public schools, because of religious principles, race, color or national origin." The clause of the New Jersey Constitution contains language clearly different from that of the United States Constitution, *Cf. West Morris Regional Board of Education v. Sills*, 110 N.J. Super. 234, 58 N.J. 464 (1971), but nonetheless is at least as strict as the federal constitution, *Cf. Jenkins v. Morristown*, 58 N.J. 483 and in many instances maybe stricter, *Booker v. Board of Education*, 45 N.J. 161 (1965). Specifically hereunder the plaintiffs desire to add that the equal protection clause of the New Jersey Constitution has been applied in two general categories, either dealing with rights generally under the first half of the Article, *Cf. Boulevard Apartments v. Mayor and Council of Lodi*, 110 N.J. Super. 406 (1970), *Washington National Insurance Company v. Board of Review*, 1 N.J. 545 (1949), or in specific areas such as racial discrimination in housing, *Jones v. Haridor Realty Corp.*, 37 N.J. 384 (1962); public schools, *Morean v. Board of Education of Montclair*, 42 N.J. 237 (1964); licensing, *Hart v. Teaneck*, 135 N.J.L. 174 (1947); and religion, *In Re Adoption of Seal*, 112 N.J. Super. 325 (1970).

New Jersey very recently has dealt with the question of whether or not under its constitution, as well as the federal constitution, classification of "poor people" is justifiable and constitutional. The test most concisely set forth by our courts in the case of *Puchalski v. New Jersey State Parole Board*, 104 N.J. Super. 294, *aff'd.* at 55 N.J. 113 (1969) *cert. den.* 398 U.S. 938 (1970). With respect to the poor as a classification, the question under our concept of equal protection of the law is simply whether or not the right under the constitution is of such fundamental importance that it should not be denied anyone because of lack of funds. Applied to the case at Bar the question becomes whether education is of such fundmental importance that it should not be deprived to any child because of the relative inability of his neighbors to finance his education.

Clearly the New Jersey Constitution contains adequate independent nonfederal grounds to sustain the decision herein.

Point II

The decision of the Supreme Court of New Jersey does not bridge the "doctrine" for separation of power but rather it is consistent with the traditional power of judicial review.

Attorneys General oft rely upon the "doctrine" of separation of powers to insist that an action should or may not be cognizable in a court of law. The "doctrine" has never been used to prevent a court from examining a complaint which charged another branch of government with willful discrimination against children and taxpayers, either black and/or poor who have no other remedy than to ask the court for relief.

The doctrine itself has been expressed in various ways being denominated Judicial self-restraint, 8 Rutgers L. Rev.

501; 42ABAJ, 829 or Separation of Powers 12 Rutgers L. Rev. 449, the distinction between judicial and political power has been carefully drawn.

The legitimate concern of the State Court was perhaps best expressed when a hastily and inarticulated claim of constitutionality of the public school finance system was projected with "no record" and without being "adequately briefed even by the proponents." The court said "We only suggest that the source of a solution appears to be more legislative than judicial." *Bd. of Ed. of Elizabeth v. City Coun. of Elizabeth*, 55 N.J. 501, 510 (1970). We note that the Supreme Court was speaking of the problem of declining tax base and growing demand for governmental services. We agree with the court that the issue is *more* legislative than judicial. That is not to say it is *not* judicial. In fact, the court declined to consider the constitutional question on an inadequate record and poor briefing "at this time" at 510, thereby clearly demonstrating that upon a proper record and thorough briefing it would and should consider the issue. The Court denied the plaintiffs herein the opportunity to appear as *amicus*, in that case.

It is noteworthy that the order of the court specifically provided in the *Elizabeth* case that in the event the court determines the constitutional issue to be involved in the appeal the present plaintiffs "will be permitted to come in as friends of the court." One wonders if the court foresaw the *Robinson* case as one in which the issue might be more properly presented, since the court would not consider the record before it to properly raise the issue. Similar reasoning has been used to explain the reluctance of the United States Supreme Court to act in some cases. *Cf. Gobitis, supra.*

More recently the Chief Justice, writing for a unanimous court, foresaw this problem as one arising in the

Courts when he noted, "We, of course, do not anticipate the question whether the State statutory scheme may, because of local failures, become unequal to the constitutional promise and command." *West Morris Reg. Bd. of Ed. v. Sills*, 58 N.J. 464, 477 (footnote 7) (1971).

The defendants would have this court believe that the issue is whether a court may order a legislature to deliberate, pass or repeal a statute as unconstitutional. One would expect that the existence of the power of judicial review and the concomitant duty of a court to strike down an unconstitutional legislative *fiat* was disposed of in 1803 with Chief Justice Marshall's opinion in *Marbury v. Madison, 1 Cranch*, 137 2 L.Ed 60 (1803) or in *Muakrat v. United States*, 219 U.S. 356 (1911). New Jersey recognized judicial review a year before *Marbury* in *State v. Parkhurst*, 9 N.J.L. 427 (Sup. Ct. 1802), a doctrine which this state has consistently enforced, *Wilentz v. Hendrickson*, 135 N.J. Eq. 244 (Err. & App. 1944) even to this day *Asbury Park Press v. Woolley*, 33 N.J. 1 (1966), *C. F. Baker v. Carr*, 369 U.S. 186 (1962), *Reynolds v. Sims*, 377 U.S. 533 (1964), *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

The most liberal jurists recognize that the injured children have no power to vote and influence the other forums of Government, and even the most conservative of jurisprudents will quickly concede that the courts have the power to hold the actions of the legislative or executive branches of government against the constitution of the Federal or State Governments. *State v. Parkhurst, supra, Wilentz v. Hendrickson, supra.* There is, of course, a presumption in favor of the constitutionality of a Legislative Act. *Cf. Trustees of Rutgers College v. Richman*, 41 N.J. Super. 259, 301 (Ch. Div. 1956). Judicial review both by Federal and State Courts is exercised with great judicial

restraint, *Cf. Ashwande v. Tennessee Valley Authority*, 297 U.S. 288 (1936); *Massachusetts v. Mellon*, 262 U.S. 288 (1923); *Public Service Coordinated Transport v. Newark Elizabeth Independent Bus Owners Asso.*, 3 N.J. 118 (1949). Judicial restraint is not to be confused with a denial of the power of judicial review. Judicial restraint now compels the United States Supreme Court not to intervene.

Plaintiffs feel that when legislature inaction has perpetrated from 1875 to date, the time for action has come. Judicial Review is appropriate.

Realizing that the declaration of unconstitutionality could in effect end education in New Jersey and being totally unwilling to accept that alternative plaintiffs proceed one step further and say, in effect, "let the legislature perform its mandated function but supervise them to see that the scheme they develop is constitutional." This type of continuing jurisdiction is not novel, *Brown v. Board of Education*, 347 U.S. 483 (1954) did just that. In *Reynolds v. Sims*, 377 U.S. 533 (1964) the United States Supreme Court added the "threat," thinly veiled, that if the legislature refused to act, the courts would act. The threat was carried out in *Griffith v. County School Board of Prince Edward County*, 377 U.S. 218 (1964) wherein the Supreme Court authorized the District Court to order the county to raise sufficient tax revenue to open up the schools of a county. The order herein is certainly less harsh.

One U.S. Circuit Court has actually ordered equalization of facilities between predominately Negro and predominantly white schools. See *U.S. v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966) *cert. denied*, 389 U.S. 840, *rehearing denied*, 389 U.S. 965. The court in that case offered a proposed court order for the District Court as follows:

> "In schools heretofore maintained for Negro students, the defendants shall take prompt steps necessary to provide physical facilities, equipment, course of instruction, and instructional materials of quality equal to that provided in schools previously maintained for white students . . . By October of each year, defendants shall report to the Clerk of the Court pupil-teacher ratios, pupil-classroom ratios and per pupil expenditures both as to operating and capital improvement costs, and shall outline the steps to be taken and the time within which they shall accomplish the equalization of such schools." 372 F.2d 836, 899-900.

See also *Hobson v. Hansen*, 296 F. Supp. 401 (D.D.C. 1967).

Thus the prospect of the courts, while retaining jurisdiction, ordering defendants to take certain actions, while the legislature devised a new scheme of financing education is not so alien to our system of jurisprudence. The Court below chose to rule that the law is unconstitutional without necessarily defining all of the legislature alternative measures which would meet constitutional requirements. See *William v. Rhodes*, 393 U.S. 23, 34 (1968). Thus the degree and character of the irrational irregularities in educational financing, demonstrated in the present case can result in a finding that constitutional guarantees have been breached, while still leaving the legislature free to adopt ameliorative measures such as school district apportionment, school fund supplementations, tax reformations or reallocation of resources, which would conform to the Constitutional requirements.

Even *McInnis v. Ogilvie*, 293 F. Supp. 327 (N.D. Ill. 1968) *aff'd. per curiam sub nom McInnis v. Ogilvie*, 394 U.S. 322 (1969) relied upon by petitioner, although it was different in its substance, form and theory as com-

pared with the case *Sub Judice*, decided that the "separation of powers" was no obstacle. *McInnis v. Ogilvie, supra,* and *Burrus v. Wilkerson,* 310 F. Supp. 572 (W.D. Va. 1969), 397 U.S. 44 (1969) are unanimous in their decision that the "separation of powers" does not bar an action in the nature of that *sub judice*.

Frequently the doctrine of separation of powers is confused and/or interchanged with the doctrine of sovereign immunity by which an "unauthorized" suit against the sovereign is avoided.

A proceeding to determine the constitutional force of a statute or a suit to restrain an agent of the state from enforcing an unconstitutional statute is not barred by sovereign immunity, *Abelson's Inc. v. N.J. State Board of Optometrists,* 5 N.J. 412 (1950). This case falls precisely within the bounds of *Abelson,* it is a suit to declare a statute unconstitutional. It seeks to restrain agents from enforcing the unconstitutional statute. The docrtine of sovereign immunity simply does not apply.

To grant the Petition for Certiorari is to place in jeopardy long standing doctrines of judicial review and longstanding separation of State and Federal governments. It was these doctrines which compelled this court to uphold inequitable State financing schemes for public education in *San Antonio Independent School District v. Rodriguez,* – U.S. –, 93 S. Ct. 1278, 36 L.Ed. 16 (1973).

CONCLUSION

For all the reasons urged, and because the instant case was based upon adequate independent State grounds it is respectfully submitted that the petition should be denied.

Respectfully submitted,

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